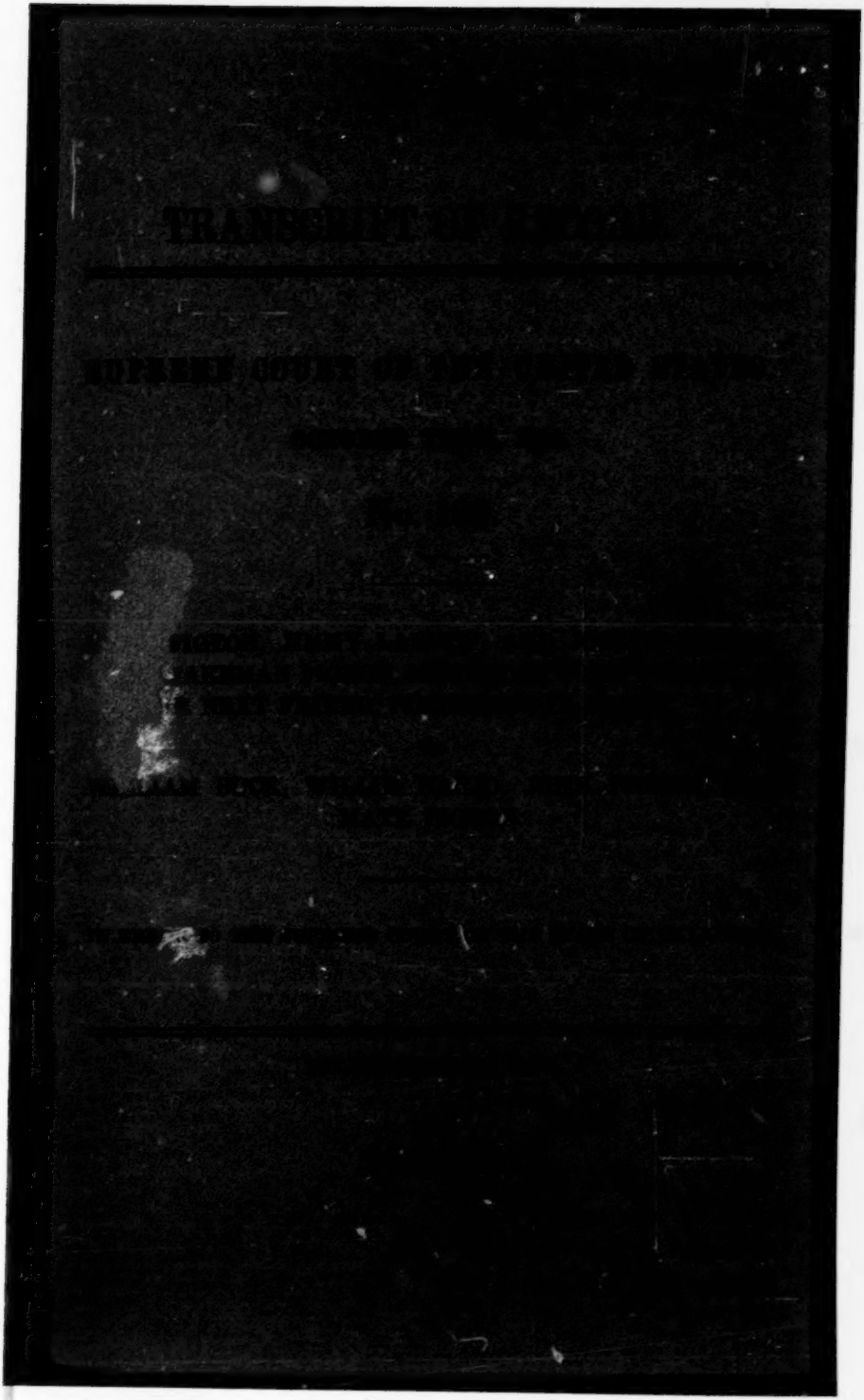

(23,754)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1914.

## No. 199.

LENA PIGEON, JIMMY LARNEY, AND JOSEPH PIGEON AND JAKEMAN PIGEON, MINORS, BY JOHN PUSLEY, AS THEIR NEXT FRIEND, PLAINTIFFS IN ERROR,

*vs.*

WILLIAM BUCK, WILLIE HARJO, JOHN PIGEON, AND MATE PIGEON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 11, 1914.

a *Return to Writ.*

STATE OF OKLAHOMA,
*Supreme Court, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Supreme Court, at Oklahoma City, this 23d day of May, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
*Clerk Supreme Court of Oklahoma,*
By JESSIE PARDOE, *Deputy.*

b UNITED STATES OF AMERICA, *ss:*

To William Buck, Willie Harjo, John Pigeon, and Mate Pigeon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Oklahoma wherein Lena Pigeon, Jimmy Larney, and Joseph Pigeon and Jakeman Pigeon, the last two being minors and sue by John Pusley as their next friend, are plaintiff- in error and you are defendant- in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Samuel W. Hayes, Chief Justice of the Supreme Court of the State of Oklahoma, this the 19th day of May, in the year of our Lord one thousand nine hundred and thirteen.

SAMUEL W. HAYES,
*Chief Justice of the Supreme Court of the State of Oklahoma.*

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

Copy of the above citation received and accepted on this the 21st day of May, 1913.

GEO. C. CRUMP AND
J. S. SKINNER,
*Counsel for said Defendants in Error;*
*Firm Name, Crump & Skinner.*

[Endorsed:] Filed May 19, 1913. W. H. L. Campbell, Clerk.

1 *Petition for and Allowance of a Writ of Error from the Supreme Court to the Supreme Court of the State of Oklahoma.*

In the Supreme Court of the State of Oklahoma.

No. 3038.

LENA PIGEON, JIMMY LARNEY, JOSEPH PIGEON, and JAKEMAN Pigeon, Last Two Minors, by John Pusley, the Next Friend of said Minors, Plaintiff- in Error,

vs.

WILLIAM BUCK, WILLIE HARJO, JOHN PIGEON, and MATE PIGEON, Defendants in Error.

To the Honorable Samuel W. Hayes, Chief Justice of the Supreme Court of the State of Oklahoma:

The petition of said Lena Pigeon, Jimmy Larney, and Joseph Pigeon and Jakeman Pigeon, the last two, minors, by John Pusley as their next friend, respectfully*s* shows:

That, heretofore, to wit, about the 13th day of September, 1910, your petitioners instituted a suit in the District Court of Hughes County, State of Oklahoma, against said defendants in error to quiet title to the Northeast quarter of section Thirty Six of Township Nine North, of Range Nine East, situated in said county and state; that about the 7th day of October, 1910, said defendants in error interposed a demurrer to the petition therein, upon the grounds that "said petition does not state facts sufficient to constitute a cause of action"; that on the 28th of June, 1911, said demurrer was sustained by said district court whereupon your petitioners declined to amend their said petition and said cause was then and there dismissed by said court, at the cost of your petitioners; that on the same day and date, to-wit, the 28th of June, 1911, your petitioners filed their motion in said cause whereby they asked that said order and judgment be set aside and a new trial therein be granted to your petitioners, but said court overruled said motion and gave judgment against your petitioners and in favor of said defendants in error, holding that your petitioners had no right, title or interest in and to said lands, and decreed that they pay the costs of said suit, to all of which your petitioners excepted; that subsequently thereto, your petitioners, by Case-Made, took said case to the Supreme Court of

said state which is the court of last resort, or highest Court
2 in said state to which said case could be taken; that on the —
day of April, 1913, said Supreme Court of said state affirmed the decree and decision of said district court, whereupon your petitioners filed their motion for a re-hearing *on* said case, in said Supreme Court, and the same was denied by said court.

Your petitioners further present that the petition filed in said cause shows that on the 12th day of July, 1905, one Lowiney Harjo departed this life, intestate, in said county and state, seised and possessed of said lands, and left her surviving her husband, said Willie Harjo, her father, John Pigeon, her mother, Mate Pigeon, and your petitioners, her brothers and sister; that said Lowiney Harjo and all these defendants in error and your petitioners are full blood Creek citizens, and members of the Creek tribe of Indians, and were enrolled as such full blood Creek citizens upon the legal rolls of said Nation; that said Lowiney Harjo obtained said lands as such member of said tribe out of the general domain of said Nation, and the same was duly allotted to her as such member under the laws of the Congress of the United States, known as the Original Creek treaty or Agreement, passed on the 1st day of March, 1901, and the Supplemental Creek treaty or Agreement, passed on the 30th of June, 1902, and approved by the council of said Nation on the 26th of July, 1902, and proclaimed on the 8th day of August, 1902, by the President of the United States; that after the death of said Lowiney Harjo, as aforesaid, the said Willie Harjo, John Pigeon and Mate Pigeon, defendants in error herein, made said defendant in error, William Buck, deeds in fee simple for said lands, and the same were attempted to be approved by the county court of said county and state, under the power and authority given in another act of Congress, entitled, "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes", and especially § 9 thereof; and that under said deeds, said defendant in error, William Buck, was claiming said lands in fee simple as against your complainants, and was maintaining that said John Pigeon and Mate Pigeon, on the death of said Lowiney Harjo, became the sole and only heirs at law of said decedent.

Your petitioners further shew that their right, title and interest in said lands arose under an Act of the Congress of the United States, entitled "A*b* Act to ratify and confirm a supplemental agreement with the Creek tribe, of Indians, and for other purposes", and especially section 6 thereof, which section is as follows:

3 "The provisions of the act of Congress approved March 1, 1901, (31 Stat. L., 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory; Provided, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: Provided further, That if there be no person of

Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizens in the order named in said chapter 49," and also under another act of said Congress, entitled, "An Act to provide for additional United States judges in Indian Territory, and for other purposes", passed on the 28th day of April, 1904, and especially section 2 thereof, which is as follows:

"All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operations, so as to embrace all persons and estates in said Territory, whether Indians, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said Territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise".

That in the record and proceedings in said case, it will appear there was drawn in question the construction and application of the 14th Amendment of the Constitution of the United States, or of a treaty, or statute, or commission held under the United States, and especially said two acts of Congress last named above; and that your petitioners claimed and set up their right, title and estate in and to said lands, under said acts of Congress etc., and said judgment and decree of said district court, and the confirmation thereof, and decree and judgment therein rendered by, said Supreme court of said State of Oklahoma, were against the right, title and interest of your petitioners, specially set up and claimed under said Acts of Congress and Constitution above mentioned; all of which is fully apparent in the proceedings and record of the case, and specially set forth in the assignment of errors filed herewith.

Wherefore, your petitioners pray that a writ of error be allowed, and that a transcript of the record, proceedings and papers upon which said orders, judgments and decrees were made, duly
4 authenticated, be ordered sent to the Supreme Court of the United States, at Washington, D. C. under the rules of said court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

LEWIS C. LAWSON,
*Counsel for said Petitioners, Holdenville, Ok.*

Filed in my office as Clerk of the Supreme Court of the State of Oklahoma, on this the 19" day of May, 1913.

W. H. L. CAMPBELL,
*Clerk of Supreme Court of the State of Oklahoma,*
By JESSIE PARDOE, *Deputy.*

5 *Assignments of Error on the Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma.*

Supreme Court of the State of Oklahoma.

No. 3038.

LENA PIGEON, JIMMY LARNEY, and JOSEPH PIGEON and JAKEMAN Pigeon, Minors, by John Pusley, as Their Next Friend, Plaintiffs in Error.

vs.

WILLIAM BUCK, WILLIE HARJO, JOHN PIGEON, and MATE PIGEON, Defendants in Error.

Comes now the said plaintiffs in error and respectfully submits that in the record, proceedings, decisions, and final judgment and decrees of the Supreme Court of the State of Oklahoma, in the above entitled cause and matters, there is manifest errors in this, to-wit:

First. That said Supreme Court of said State of Oklahoma erred in said matter and cause in holding that, under chapter 49 of the Statutes of Arkansas, and sections 2522 and 2531 thereof, put in force and effect under the Acts of the Congress of the United States hereinafter mentioned, in the Indian Territory, on the 30th of June, 1902, and 28th of April, 1904, respectively, "the allotment of a full blood citizen of the Creek Nation, duly enrolled as such, who died on July 12, 1905, after receiving her certificates and patents thereto, was not a new acquisition, but came to her (Lowiney Harjo), by the blood of her tribal parents, who on her death took full title thereto to the exclusion of the brothers and sister (plaintiffs in error) of the deceased (Lowiney Harjo), all full bloods".

Second. That said court also erred in holding that "the land in question was not a new acquisition and pursuant to said sections when construed together passed to John Pigeon and Mate Pigeon. the father and mother of the deceased, is no longer an open question in its jurisdiction, having in effect been decided by the Circuit Court of Appeals for the Eighth Circuit in Shulthis vs. McDougal, 170 Fed. 529".

Third. That said court also erred in holding "many titles to lands on the eastern side of this (said) state have been ac-

6 quired on the strength of this decision, and to such an extent that the same has become a rule of property there", there being no facts established by the record herein showing that said decision had become a rule of property in the eastern part of said state; and said decision not having been rendered by a court of last resort having ultimate jurisdiction of the matters therein, or in the case at bar, involved, the same could not, in said jurisdiction of said state, become a rule of property conclusively binding upon said palaintiffs in error, or upon said Supreme Court of said

state in passing upon the right, title and interest of said plaintiffs in error, in and to said lands involved in this suit.

Fourth. That said court also erred in holding that "John Pigeon and Mate Pigeon, his wife, are the persons to whom on the death of the allottee (Lowiney Harjo), this estate passed in equal moities and that plaintiffs in error, plaintiffs below, have no interest therein"; and that "for that reason, the (said district) court did not err in sustaining the demurrer to their petition".

Fifth. That said court erred in holding that, upon the death of said Lowiney Harjo, the plaintiffs in error took no right, title, interest or estate in or to said lands in controversy; but that said lands and all right, title and interest therein passed to said John Pigeon and Mate Pigeon in equal moieties, to the entire exclusion of said plaintiffs in error; and for said reasons, affirming the said judgment and decree of said district court.

Plaintiffs in error further say that said judgment and decision of said Supreme Court of the State of Oklahoma aforesaid is repugnant to and in conflict with the 14th Amendment to the Constitution of the United States and with two acts of Congress, one entitled, "An Act to ratify and confirm a supplemental agreement with the Creek tribe of Indians, and for other purposes", and especially section 6 thereof which reads as follows:

"The provision- of the act of Congress approved March 1, -901, (31 Stat. L., 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: Provided, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek
7 Nation: And provided further, That if there be no persons of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49"; and said other act is entitled, "An act to provide additional United States Judges in the Indian Territory, and for other purposes", and especially section 2 thereof which reads as follows:

"All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operations, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said Territory in the settlements of all estates of decedents, the guardianship of minors and incompetents, whether Indians, freedmen, or otherwise", passed on the 28th of April, 1904.

Plaintiffs in error further state that said Supreme Court of said State of Oklahoma is the highest court of said state in which a decision in this suit could be had; that the right, title and interest of the plaintiffs in error, in and to said lands in controversy in this suit, were derived from, and arose out of, said acts of Congress mentioned in this proceeding, and especially said last two acts above

named and the said sections herein set forth, and said chapter 49 of Arkansas put in force in said Indian Territory under, and as provided in, said acts of Congress; that, in said suit and proceedings thereof, as shown by the record, proceedings and papers in this case, and the decision of said Supreme Court of said State, the plaintiffs in error specially set up and claimed said lands under and by reason of said acts of Congress; and that, by its decision rendered in this suit, said Supreme Court denied to the plaintiffs in error all right, title, interest and estate in and to said lands, and decreed the same to said John Pigeon and Mate Pigeon, and thereby indirectly to said defendant in error, William Buck, under and by reason of said deeds so made to him by said John and Mate Pigeon, in fee simple forever. And to which said judgment and decision of said Supreme Court, plaintiffs in error except, and assign the same as error on the grounds above given.

Wherefore, the said plaintiffs in error pray that the judgment and decision of said Supreme Court of the State of Oklahoma, may be reversed, annulled and altogether held for naught, and that they be restored to all things which they have lost by this action
8 and because of said judgment and decision of said court, and be adjudged in this court to be the owners in fee simple of said lands in controversy in this suit.

LEWIS C. LAWSON,
*Counsel for Plaintiffs in Error, Holdenville, Ok.*

Filed May 19, 1913. W. H. L. Campbell, Clerk.

9 *Order Allowing Writ of Error from the Supreme Court to the Supreme Court of the State of Oklahoma.*

The Supreme Court of the State of Oklahoma.

No. 3038.

LENA PIGEON, JIMMY LARNEY, and JOSEPH PIGEON and JAKEMAN PIGEON, Minors, by John Pusley, as Their Next Friend, Plaintiffs in Error,

vs.

WILLIAM BUCK, WILLIE HARJO, JOHN PIGEON, and MATE PIGEON, Defendants in Error.

The above entitled matter coming on to be heard upon the petition *upon the petition* of the said plaintiffs in error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma, and upon the examination of said petition and the record in said matter, and desiring to give said petitioners an opportunity to present in the Supreme Court of the United States the question presented by the record in said matters.

It is ordered that a writ of error be, and the same is hereby, allowed to this court from the Supreme Court of the United States,

and that the bond be and the same is hereby, fixed at the sum of $250.00 to be given by said plaintiffs in error, or one or more of them, with surety and all other provisions, conditioned according to law in such cases. This the 19th of May, 1913.

SAMUEL W. HAYES,
*Chief Justice of the Supreme Court of the State of Oklahoma.*

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

Filed May 19, 1913. W. H. L. Campbell, Clerk.

10 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Lena Pigeon, Jimmy Larney, and Joseph Pigeon and Jakeman Pigeon by John Pusley as next friend of said last two plaintiffs in error, who are minors, plaintiffs in error, and William Buck, Willie Harjo, John Pigeon and Mate Pigeon, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution,
11 or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Lena Pigeon, Jimmy Larney, Joseph Pigeon and Jakeman Pigeon as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error,

what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 19th day of May, in the year of our Lord one thousand nine hundred and Thirteen.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
*Clerk of the United States District Court*
*for the Western District of Oklahoma.*

Allowed by—

SAMUEL W. HAYES,
*Chief Justice of the Supreme Court*
*of the State of Oklahoma.*

[Endorsed:] Filed May 19, 1913. W. H. L. Campbell, Clerk.

12 Know all men by these presents, That we, Lena Pigeon, as principal, and S. B. Turner and J. B. Turner, as sureties, are held and firmly bound unto William Buck, Willie Harjo, John Pigeon and Mate Pigeon in the full and just sum of Two Hundred and fifty ($250.00) Dollars, to be paid to the said William Buck, Willie Harjo, John Pigeon and Mate Pigeon or to their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of May, in the year of our Lord one thousand nine hundred and Thirteen.

Whereas, lately at a recent term of the Supreme Court of the State of Oklahoma, in a suit depending in said Court, between Lena Pigeon, Jimmy Larney, Joseph Pigeon, and Jakeman Pigeon as plaintiffs in error, and William Buck, Willie Harjo, John Pigeon, and Mate Pigeon as defendants in error a judgment or decree was rendered against the said Lena Pigeon, Jimmy Larney, Joseph Pigeon and Jakeman Pigeon and the said Len- Pigeon, Jimmy Larney, Joseph Pigeon and Jakeman Pigeon having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said William Buck, Willie Harjo, John Pigeon and Mate Pigeon citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Lena Pigeon, Jimmy Larney, Joseph Pigeon and Jakeman Pigeon shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the

above obligation to be void; else to remain in full force and virtue.

her
LENA x PIGEON. [SEAL.]
mark.
S. B. TURNER. [SEAL.]
J. B. TURNER. [SEAL.]

Sealed and delivered in presence of—
LEWIS C. LAWSON.

Approved by—
SAMUEL W. HAYES,
*Chief Justice Supreme Court of State of Oklahoma.*

13 STATE OF OKLAHOMA,
*County of Hughes, To-wit:*

S. B. Turner and J. B. Turner whose names are signed to the within bond of Lena Pigeon as the cost bond in her case and other against William Buck et al., as surties thereof, being first duly sworn say that they are each worth and have available property of the true value of more than two hundred and fifty dollars, over and above all exemptions under the laws of said state.

S. B. TURNER.
J. B. TURNER.

Taken, subscribed and sworn to before me by said S. B. Turner and J. B. Turner on this the 22nd day of May, 1913.

[SEAL.] V. W. SNIDER,
*Notary Public in and for said Hughes County, State of Oklahoma.*

My commission expires on the 31 day of July, 1916.

Endorsed on the back: #3038. Supersedeas Bond. Filed May 23, 1913.

14 No. 3038.

In the Supreme Court of the State of Oklahoma.

LENA PIGEON et al., Plaintiffs in Error.
vs.
WILLIAM BUCK et al., Defendants in Error.

*Petition in Error.*

Filed Sept. 13, 191-. W. H. L. Campbell, Clerk.

Come now the plaintiff- in error and for their cause of appeal in this case, charge and aver:

First. That on the 13th day of September, 1910, they instituted

a suit against defendants in error, (page 1) in the District Court of Hughes County, State of Oklahoma, to have certain deed- upon the North East Quarter of Section Thirty Six, Township Nine North, Range Nine East removed as clouds thereon and to settle the title thereto among the plaintiffs in error and certain of said defendants in error; that said lands were the allotment of Lowiney Harjo who departed this life intestate on the 12th day of July, 1905, leaving her surviving her father said John Pigeon, her mother said Mate Pigeon, and the plaintiffs in error, Lena Pigeon Jimmy Larney, Joseph Pigeon and Jakeman Pigeon, her brothers and sisters, and also a husband, Willie Harjo; that said Loweney and said Willie were married and of said marriage one child was born, but the same was dead when born; and that all parties hereto are full blood Creek citizens and are so enrolled, as members of the Creek Nation; that said Willie Harjo, John Pigeon and Mate Pigeon made deeds to defendant in error, William Buck, for said lands above described, after the death of said Lowiney, all of which are fully shown in the petition a copy of which is filed as a part of the case-made of said cause, which — herewith filed as part hereof: that said John and Mate Pigeon thereby attempted to sell and convey to said Buck the fee simple title to said lands and thereafter pretended to have said deed approved by the County Court of said County; but before the death of said Lowiney, she had rented said lands for a term of years and the term has not yet expired.

Second. That plaintiffs in error claim to be the owners in fee simple of said lands and obtained them by inheritance from said Lowiney under the laws in force at the time of her death; and that upon her death said lands became a new acquisition and passed under section 2531 of chapter 49 of the Statutes of Arkansas theretofore put in force in Indian Territory, and passes to plaintiffs in error in fee subject to a life estate therein of said father and mother, as therein provided; and that said pretended deeds and approval are clouds upon their title to said lands;

Third. That on the 7th day of October, 1910 (page 21) the defendants in error demurred to said petition on the ground that the same "does not state facts sufficient to constitute a cause of action", page 22; whereupon said court on the 28th of June, 1911, (page 24) sustained said demurrer to which plaintiffs in error excepted; and plaintiffs in error refusing to amend said petition, said court dismissed said action at their cost, to which they again excepted, as shown in said order on pages 24 and 25.

Fourth. That on the 28th day of June, 1911, said plaintiffs in error moved said court to set aside said order sustaining said demurrer and dismissing said suit, which motion was overruled by said court to which plaintiffs in error again excepted, (24 and 25) and for said motions see page 26 of the Case-made.

Plaintiffs in error contend there are errors in the orders and judgment of said court, as follows;

First Assignment.

Because the court erred in sustaining said demurrer and in dismissing said suit;

Second Assignment.

Because the court erred in overruling the motion of plaintiffs in error for a new trial in said cause on the grounds set forth in said motion and the same, and each of them, are hereby referred to as part of this assignment;

Third Assignment.

Because said order and judgment of the court is contrary to the law and evidence in this case;

Fourth Assignment.

Because of the numerous errors of law occurring at the
16 trial, and excepted to by the plaintiffs in error.

Upon the foregoing assignments, the plaintiffs in error pray that said order and judgment be set aside, reversed and the case remanded, or that plaintiffs in error be adjudged the owners in fee simple of said lands and the same be decreed to them accordingly.

LEWIS C. LAWSON,
*Counsel for Plaintiffs in Error.*

17 In the District Court in and for Hughes County, Oklahoma.

No. 606.

LENA PIGEON, JIMMY LARNEY, and JOSEPH PIGEON and JAKEMAN Pigeon, Minors, by Jno. Pusley, the Next Friend of said Minors, Plaintiffs,

vs.

WILLIAM BUCK, WILLIE HARJO, JOHN and MATE PIGEON, Defendants.

*Index to Case-Made.*

District Court, County of Hughes, State of Oklahoma. Filed Sep. 12, 1911. T. E. Neal, District Clerk, by A. F. Hall, Deputy. Filed Sep. 13, 1911. W. H. L. Compbell, Clerk.

18 Be it remembered that on the 13th day of September, A. D. 1910, the Plaintiffs herein, Lena Pigeon, et al., commenced this action against the defendants, William Buck, et al., by filing their petition here in the office of the Clerk of the District Court in and for Hughes County, Oklahoma, which said petition is in words and figures as follows, to-wit:

19 LENA PIGEON, JIMMY LARNEY, and JOSEPH PIGEON and Jakeman Pigeon, Minors, by Jno. Pusley, the Next Friend of said Minors, Plaintiffs,

vs.

WILLIAM BUCK, WILLIE HARJO, JOHN PIGEON, and MATE PIGEON, Defendants.

*Petition.*

Comes now the above named Plaintiffs, and for their cause of action against the above named defendants, charge and aver;

First. That one Lowiney Harjo was full-blood Creek Citizen of the Creek Nation, and was duly enrolled as a member of said Nation and as such full-blood; that as such member and citizen of said Nation, the said Lowiney was duly allotted the North East Quarter of Section Thirty-six, Township Nine North, Range Nine East out of the general domain of said Nation, as her due and proportionate part thereof; and that during her natural lifetime, received her certificate and patents for said lands, in the way and manner provided by law, in like cases and allotments; and that said Joseph Pigeon and Jakeman Pigeon are minors, and under the age of twenty-one years; and sue by John Pusley as their next friend.

That on the 12th day of July, 1905, the said Lowiney Harjo departed this life, intestate and without a will, leaving her surviving said Plaintiffs, her brothers and sister, and said Willie Harjo, her husband, and said John Pigeon her father and said Mate Pigeon, her mother; that said Lowiney left no child or children or the decedents of any child or children to survive her; that sometime before her death aforesaid, the said Lowiney was married to said Willie Harjo, and of said marriage there was one child only born, but that said child died before it was born and was dead at the time of its birth; and that said child was the only issue of said marriage.

Third. That each of said Plaintiffs and defendants are
20 full-blood Creek Indians and members of the Creek Nation, and were, and still are, enrolled as full-blood Creek Indians upon the legal rolls of the members of said Nation, made and approved in the way and manner provided by law; that said lands so allotted and assigned to said Lowiney are situated in said County of Hughes, State of Oklahoma, and upon the death of said Lowiney as aforesaid, said lands became a new acquisition whereupon, under

the laws then in force and effect in said Indian Territory, said John Pigeon became vested with a life estate in said lands and the fee simple title thereto vested in equal parts in the Plaintiffs herein, as the brothers and sisters of said Lowiney, and as such his sole and only heirs at law; and that said Willie Harjo as her surviving husband failed to take curtesy in said lands:

Fourth. That on the 19th day of August, 1909, said Willie Harjo, made said Buck a Warranty deed for said lands and the same was admitted to record in the office of the Register of Deeds in and for said County of Hughes, on the 21st day of the same month, and recorded therein in Deed Book No. 4, on page 21, a duly certified copy of which is herewith filed as part hereof marked Exhibit "A", that on the 28th day of the same month and year, said Harjo made said Buck another deed for said lands, and the same was admitted to record in said office and recorded in said deed Book No. 4, on page 38, a duly certified copy of which is likewise filed herewith as part hereof marked Exhibit "B"; that said Harjo filed his petition before the County Court of said Hughes County, praying that said last named deed be approved by said Court, whereupon said Court, on the 28th day of August, 1909, gave a hearing upon said petition and rendered an order therein approving said deed said deed so made to said Buck by said Harjo, dated the 28th of August, 1909, and the same was admitted to record in said office
21 in said Deed Book No. 4, on page 38, 39, etc. a certified copy of which is herewith filed as part hereof marked Exhibit "C"; that on the 17th day of said month and year, said John and Mate Pigeon made said Buck another deed for said lands claiming to be the sole and only heirs of said Lowiney, and the same was admitted to record in said office in said Deed Book No. 4, on pages 4 and 5, a duly certified copy of which is herewith filed as part hereof marked Exhibit "D"; and that said John and Mate Pigeon filed their petition before said County Court to have their said deed approved by said Court Whereupon said Court gave a hearing upon said petition and made and entered an order thereupon the 17 day of August, 1909, approving said deed, and the same was admitted to record in said office and therein recorded in said Deed Book 4 on pages 4 and 5 thereof, a duly certified copy of which is herewith filed as part hereof, marked Exhibit "E";

Fifth. That, as brothers and sisters of said Lowiney, Plaintiffs were and now are the sole and only heirs of said Lowiney, and upon her death, became entitled to the fee simple title to said lands under the laws of descent in force at the time of her death, subject, however, to a life estate therein of said John Pigeon; that said Willie Harjo had no right, title, or interest in said lands or to the possession thereof; that said pretended deeds of said Harjo, John Pigeon and Mate Pigeon, as well as the said approvals thereof by said County Court, are void and ineffectual for any purpose; that said Harjo, John Pigeon and Mate Pigeon are full-blood Creek Indians, and so enrolled as full-bloods, and their said deeds to become effectual for any purpose should have been, but were not, approved by the Secretary of the Interior; that said pretended grantors, Harjo,

John and Mate Pigeon were not the owners in fee simple of said lands or any part thereof, at the respective dates of said deeds; and that said County Court, at the time of so making said orders
22 approving said respective deeds and determining that said Harjo and Pigeons were the owners in fee of said lands, and before that time and ever after, had no jurisdiction whatever of such matters, or over said estate or to make and enter either of said orders aforesaid, approving either of said deeds to said Buck from said Harjo or said John and Mate Pigeon; and that said orders of approval and each of them are null, void and ineffectual for any purpose, for the reason that said Court had no such jurisdiction respecting said matters, as it assumed to exercise therein in approving said deeds and determining the title to said lands, as so attempted in said respective orders.

Sixth. That said deeds from said Harjo and John and Mate Pigeon are clouds upon the title to said lands in the hands of Plaintiffs; that said approvals of said deeds by said County Court are likewise clouds upon the title to said lands, and upon the rights and interests therein of plaintiffs, and such clouds greatly depreciate and lessen the market value thereof, and, unless removed or set aside, will operate and result in an irreparable injury and damage to these plaintiffs as to their rights and interests in said lands; that before her death, said Lowiney rented out said lands for a term of several years and the said term or lease has not yet expired and the tenant thereunder is now in possession of said lands, under and by virtue of said lease; and that by reason of said pretended deeds from said Harjo, John Pigeon and Mate Pigeon and the said approvals thereof by said County Court, the said William Buck is now threatening to institute legal proceedings to obtain the possession and control of said lands; that said Buck is not entitled to the possession or control of said lands, nor to the rents, issues or profits therefrom aris-
23 ing, under said deeds or approvals or otherwise, for the reason that he has no right, title or interest in or to said lands or any part thereof, under any of said deeds or said approvals of said Court, or otherwise; and that said deeds and approvals thereof, aforesaid are null, void and ineffectual, and passed no title whatever in or to said lands to said Buck by reason thereof;

Seventh. That said lands are reasonably worth and are of the reasonable value of twenty-five hundred dollars, and said heirs have recently been offered the sum of two thousand dollars therefor if the title thereto should be made clear and certain and said deeds and approvals be removed as clouds therefrom; and plaintiffs are informed and believe and upon that information and belief, here charge and aver that, in so obtaining said respective deeds for said lands and said approvals thereof by and before said county Court, said William Buck practiced a gross fraud and imposition on Harjo and said John and Mate Pigeon and said County Court by inducing said Harjo and Pigeons to execute said respective deeds for the small consideration therein named, and to file petitions before said Court for the approval thereof, and then, in order to induce said Court to approve said deeds and thereby to obtain said lands for a

grossly inadequate consideration, adduced before said Court witnesses to show such inadequate consideration, and thereby did produce testimony and evidence before said Court showing or tending to show that said parties filing said petitions were the true owners in fee simple of said lands, and that their respective interest therein were worth only the respective sums of $200.00 and $320.00 said Buck knowing at the time he was thus purchasing said lands and adducing said evidence before said Court for the purpose of obtaining said lands for far less than their actual value; that said lands were very
24 valuable and worth in open market far more than the small and insignificant sums he was thus paying for said lands; that in so doing, said Buck so obtained said approvals to said deeds without said Court knowing the real and true value of said lands, and thus deceived and defrauded the Court into approving said deeds which said Court would not have done had it known the true and real value of said lands and the rights and interest of all parties hereto; and that in so obtaining said deeds and approvals, said Buck has thus beclouded the title of plaintiffs to said lands and caused them thereby great and unnecessary loss, expense and damages in protecting and defending their title therein; and that said John Pigeon and Mate Pigeon cannot speak or understand English and did not understand the laws respecting such matters or their rights in said lands, but that said Buck is a native Creek Citizen and speaks and understands both Creek and English fluently and thus took this unconscionable advantage of said parties in said matters and in obtaining said deeds and approvals.

Wherefore, plaintiffs pray that said William Buck, Willie Harjo, John Pigeon and Mate Pigeon be made parties Defendants hereto and required to answer this petition on oath; that proper process herein do issue; that all proper orders and decrees herein be made and entered; that said deeds from said Willie Harjo and from said John Pigeon and Mate Pigeon, as well as said two orders of said County Court, approving said deeds, be set aside, cancelled and annulled by a decree of this Court, and removed as clouds upon the title to said lands; that plaintiffs be decreed the fee simple title to said lands; that said William Buck be enjoined and restrained from in anywise interfering with the rights and interests of these plaintiffs in and to said lands or with the possession and control thereof, until the rights of all parties hereto are finally determined
25 in this suit; that Plaintiff be quieted in the possession and enjoyment of said lands, and be decreed their costs herein expended; and that all such other further and general relief herein may be granted to plaintiffs as the nature of this case may require or which to equity and good conscience may seem just and proper, and they will ever pray, etc.

LENA PIGEON,
SENE LANE PIGEON,
JIMMY LARNEY,
JOHN PUSLEY,
*Plaintiffs.*

LEWIS C. LAWSON,
*Counsel for Plaintiffs.*

Taken, subscribed and sworn to before me on this the 6th day of September, 1910.

[SEAL.] JNO. CORDELL,
*Notary Public in and for said County and State.*

My Commission expires the 24 day of Sept. 1913.

26 Willie Harjo. William Buck.

*Warranty Deed.*

This Indenture, Made this 19th day of August, A. D. 1909, between Willie Harjo of Wetumka, Hughes County in the State of Oklahoma, of the first part, and William Buck of Wetumka, Oklahoma of the second part.

Witnesseth. That said party of the first part, in consideration of the sum of Three Hundred and no/100 Dollars, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, convey unto the said party of the second part, his heirs and assigns, all of the following described real estate in the County of Hughes and State of Oklahoma, to-wit:

The North East Quarter of Section 36, Township 9 North Range 9 East of the Indian Base and Meridian, the same being the allotment of Lowiney Harjo, deceased.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining forever.

And said Willie Harjo for his heirs, executors or administrators, do hereby covenant, promise and agree to and with said party of the second part, that at the delivery of these presents he lawfully seized in his own right of an absolute and indefeasible estate of inheritance, in fee simple, of, in and to all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged and unincumbered of and from all former grants, titles, charges, judgments, taxes, assessments and incumbrances of what nature and kind soever; and that he will warrant and forever defend the same unto said party of the second part, his heirs and assigns, against said party of the first part of their heirs, and all and every person whomsoever, lawfully claiming or so claim the same.

"EXHIBIT A."

27 In witness whereof, the said party of the first part has hereunto set his hands, the day and year above written.

WILLIE HARJO.

STATE OF OKLAHOMA,
*Hughes County, ss:*

Before me, B. H. Mills, a Notary Public, in and for said County and State, on this 19th day of August, 1909, personally appeared

Willie Harjo and —— —— to *be* known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

[SEAL.] B. H. MILLS,
*Notary Public.*

My Commission expires December 28, 1911.

I hereby certify that this instrument was filed for record on the 21st day of August, A. D. 1909, at 11:30 o'clock A. M.

C. C. LEACH,
*Register of Deeds.*

"EXHIBIT A."

Endorsed on Back.

STATE OF OKLAHOMA,
*County of Hughes, ss:*

I, C. C. Leach, Register of Deeds in and for the County and State above named do hereby certify that the foregoing is a true and correct copy of a like instrument now of record in my office in Book 4 Deeds at page 21.

Witness my hand and Official seal this 3 day of Sept., 1910.

C. C. LEACH,
*Register of Deeds,*
By NORA ROBINSON, *Deputy.*

28 STATE OF OKLAHOMA,
*Hughes County, ss:*

Know all men by these presents:

That I, Willie Harjo, Creek Indian Roll No. 6589, and as widower, and former husband of Lowiney Harjo, deceased, party of the first part, in consideration of the sum of Two Hundred and no/100 Dollars in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto William Buck, the following described real property and premises, situate in Hughes County, State of Oklahoma, to-wit:

The Northeast Quarter of Section Thirty Six, Township Nine North, Range Nine East, It being my entire interest in said land my interest being a life estate in and to the same, together with all the improvements thereon and the appurtenances thereunto belonging, and warrant the title to the same, for and during my life, but no longer.

To have and to hold said described premises unto the said party of the second part, his heirs and assigns forever, free, clear and discharged of and from all former grants, charges, taxes, judgments, mortgages and other liens and encumbrances of whatsoever nature;

Signed and delivered this 28th day of August, 1909.

WILLIE HARJO,
—— ——.

J. H. ALEXANDER,
—— ——.

STATE OF OKLAHOMA,
*Hughes County, ss:*

Before me, a Notary Public within and for said County and State on the 28th day of August, 1909, personally appeared Willie Harjo, a widower, and to me known to be the identical person who executed the within and foregoing instrument and acknowledged to
29 me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and date above written.

[SEAL.] J. H. ALEXANDER,
*Notary Public.*

My Com. exp. April 25, 1912.

Approved Aug. 28, 1909.
[SEAL.] P. W. GARDNER,
*County Judge.*

Filed 9/15-10.
E. F. MESSENGER, *Clerk.*

EXHIBIT "B."

30 In the County Court in and for Hughes County, Oklahoma.

In the Matter of Approval of Deed for Lands Inherited from Lowiney Harjo, by Willie Harjo.

Willie Harjo, Petitioner.

*Order of Approval.*

Willie Harjo, having filed his petition in this Court for approval of a certain deed given by him to William Buck conveying his life estate in and to a certain lands allotted to Lowiney Harjo, deceased, and the matter coming on now to be heard on said petition, and the Court having heard the testimony of Willie Harjo and of William Buck and being fully advised finds that said Willie Harjo, is a full-blood Creek Indian and that his name appears on the Creek Indian Roll opposite Roll No. 6589, that Lowiney Harjo was a full blood Creek Indian and that her name appears on the Creek Indian roll opposite roll No. 6590, and that there was allotted to said Lowiney Harjo as her part of the lands held in common by the Creek Tribe of Indians the following described lands situated in Hughes County, State of Oklahoma, to-wit:

The Northeast Quarter of Section Thirty six, Township 9 North, Range 9 East.

The Court further finds that said Lowiney Harjo is dead, that she died in what is now Hughes County, State of Oklahoma, on July 12, 1905, and that she was a bona fide resident of what is now Hughes County, State of Oklahoma, at the time of her death, and

that this Court has full and complete jurisdiction of the estate of said Lowiney Harjo, deceased.

The Court further finds that the said Lowiney Harjo, deceased, and Willie Harjo were wife and husband at the time of the death of Lowiney Harjo, and that they, Lowiney Harjo and Willie Harjo, had one child born to them which child died prior to the death of its mother, the said Lowiney Harjo; that the said Lowiney
31 Harjo, left no issue, nor the descendants of any issue surviving her, and that she left surviving her as her sole heirs at law, John Pigeon and Mate Pigeon, her father and mother; that on death of said Lowiney Harjo, deceased, the said John Pigeon and Mate Pigeon became the owners in fee simple *to* the lands allotted to said Lowiney Harjo, deceased subject to the life estate in same owned by Willie Harjo, the petitioner herein and husband of said Lowiney Harjo, deceased.

The Court further finds that said Willie Harjo, by his deed dated Aug. 28, 1909, conveyed his life estate in and to said lands allotted to said Lowiney Harjo, deceased to William Buck for the consideration of $200.00, which sum the Court finds is not disproportionate to the actual value of said life estate.

Wherefore, premises considered, it is ordered, adjudged and decreed that said deed dated Aug. 28, 1909, executed by Willie Harjo, conveying his life estate in and to said Northeast Quarter of Sec. 36, Twp. 9 North, Range 9 East, Hughes County, State of Oklahoma, to William Buck for the consideration of $200.00 which consideration has been duly paid, be, and the same is hereby and here now approved by this Court.

Witness the hand of the County Judge of Hughes County, State of Oklahoma, and the seal of the County Court, thereof, this Aug. 28, 1909.

[SEAL.]

P. W. GARDNER,
*County Judge, Hughes Co., Okla.*

STATE OF OKLAHOMA,
*Hughes County, ss:*

I, C. L. Smith, County Stenographer and ex-Officio Clerk County Court in and for the County and State aforesaid, do hereby certify that the above and foregoing is a full, true and complete copy of an order approving a warranty deed from Willie Harjo, full blood Indian and heir of Lowiney Harjo, deceased, Probate No. 574.

Witness my hand and the official seal of the County Court this the 28th day of August, 1909.

C. L. SMITH,
*County Stenographer and ex-Officio Clerk County Court.*

32 I hereby certify that this instrument was filed for record on 28th day of August, A. D. 1909, at 11:45 o'clock A. M.

C. C. LEACH,
*Register of Deeds.*

"Exhibit C."

Endorsed on Back: Filed Sept. 13, 1910, E. F. Messenger, Clerk.

STATE OF OKLAHOMA,
*County of Hughes, ss:*

I, C. C. Leach, Register of Deeds in and for the County and State above named, do hereby certify that the foregoing is a true and correct copy of a like instrument now of record in my office, in Book 4 of Deeds at pages 38-9.

Witness my hand and official seal this 3 day of Sept. 1910.

C. C. LEACH,
*Register of Deeds,*
By NORA ROBINSON,
*Deputy.*

EXHIBIT C.

33 STATE OF OKLAHOMA,
*Hughes County, ss:*

Know All Men by These Presents:

That we, John Pigeon and Mate Pigeon, sole heirs of Lowiney Harjo, deceased, and being the father and mother of said Lowiney Harjo, deceased, parties of the first part, in consideration of the sum of Three Hundred and no/100 Dollars, in hand paid, the receipt of which is hereby acknowledged do hereby grant, bargain, sell and convey unto William Buck the following described real property and premises, situate in Hughes County, State of Oklahoma, to-wit:

The Northeast Quarter of Section Thirty six (36) Township Nine (9) North, Range Nine (9) East, the same being the allotment of Lowiney Harjo, deceased, together with all the improvements thereon and the appurtenances thereunto belonging and warrant the title to the same.

To have and to hold said described premises unto the said party of the second part, his heirs and assigns forever, free, clear and discharged of and from all former grants, charges, taxes, judgments, mortgages and other liens and encumbrances of whatsoever nature; subject to the life estate in said land of Willie Harjo.

Signed and delivered this 17th day of August, 1909.

his
JOHN x PIGEON.
mark.

her
MATE PIGEON. x
mark.

Witness to mark:
J. R. WITTY.

STATE OF OKLAHOMA,
*Hughes County, ss:*

Before me, a notary Public within and for said County and State, on the 17th day of August, 1909, personally appeared John Pigeon and Mate Pigeon, his wife, and to me known to be the identical per-

sons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and
34 voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and date above written.

[SEAL.] J. H. ALEXANDER,
*Notary Public.*

My commission expires. *My Com. Exp.* April 25, 1912.

"Approved Aug 17, 1909.

[SEAL.] P. W. GARDNER,
*County Judge.*

Exhibit "D".

Endorsed on Back: Filed Sept. 13, 1910, E. F. Messenger, Clerk.

35 In the County Court in and for Hughes County. State of Oklahoma.

In the Matter of Sale of Lands Inherited from Lowiney Harjo, by JOHN PIGEON and MATE PIGEON, Full-blood Creek Indian Heirs; JOHN PIGEON and MATE PIGEON, Petitioners.

*Order of Approval.*

John Pigeon and Mate Pigeon having filed in this Court their petition for the approval of a certain deed given by them to lands inherited from Lowiney Harjo, deceased, said deed conveying said lands to William Buck, and the matter coming on now on this August 17, 1909, to be heard on said petition, and the Court having heard the testimony of said Petitioners and of B. N. Mills, and being fully advised finds, that said John Pigeon and Mate Pigeon are full blood Creek Indians, and that their names appear on the Creek Indian Roll Opposite Creek Indian Roll Nos. 7265 and 7260 respectfully; that both of said petitioners are over the age of twenty one years; that Lowiney Harjo was a Creek Indian and that her name appears on the Creek Indian Roll opposite Creek Indian Roll No. 6590.

The Court further finds that there was allotted to said Lowiney Harjo, as her proportionate part of the lands held in common by the Creek Tribe of Indians the following described lands situated in Hughes County, State of Oklahoma, to-wit: The Northeast Quarter of Section Thirty six (36), Township Nine (9) North, Range Nine (9) East.

The Court further finds that the said Lowinev Harjo, died in what is now Hughes County, State of Oklahoma, on or about Julv 12, 1905, leaving no issue, nor descendants surviving her; that she was a bona fide resident of what is now Hughes County, State of Oklahoma, at the time of her death; that she left surviving her Willie Harjo, her husband and that she left as her sole surviving heirs the

petitioners, John Pigeon and Mate Pigeon who were the father and the mother of said Lowney Harjo, deceased and that there
36 was born to said Lowiney Harjo one child by her husband Willie Harjo, which child died before the death of said Lowiney Harjo.

The Court further finds that there was no administration of the estate of said Lowiney Harjo, deceased, and no necessity for administration on said estate for the reason there *was* were no claims to come against said estate, and that this Court has full and complete jurisdiction of the estate of said Lowiney Harjo, deceased.

The Court further finds that said John Pigeon and Mate Pigeon, being the father and mother of said Lowiney Harjo, are the owners in fee simple of the above described lands, situated in Hughes County, Okla., to wit- The Northeast Quarter of Section 35, Twp. 9 North, Range 9 East subject to the life estate in the same owned by Willie Harjo, husband of said Lowiney Harjo, deceased.

The Court further finds that on August 17, 1909, the said John Pigeon and Mate Pigeon executed and delivered to William Buck their deed conveying the above lands to said William Buck for the consideration of $320.00; that said sum is not disproportionate to the actual value of said land subject to said life estate of said Willie Harjo.

It is therefore, oensidered, ordered and adjudged that said deed, dated Aug. 17, 1909, given by John Pigeon and Mate Pigeon conveying said land to William Buck for the consideration of $350.00 be, and the same is hereby approved.

Witness my hand and the seal of the County Court of Hughes County, Okla., this Aug. 17, 1909.

[SEAL.]

P. W. GARDNER,
*County Judge, Hughes County, Okla.*

STATE OF OKLAHOMA,
*Hughes County, ss:*

*Certificate of True Copy.*

I, C. L. Smith, County Stenographer and Ex-Officio Clerk County Court, in and for the County and State aforesaid do hereby
37 certify that the above and foregoing is a full, true and complete copy of an order approving a warranty deed from John Pigeon and Mate Pigeon, full blood Indians and heirs of Lowiney Pigeon, deceased, Probate No. 550, to William Buck.

Witness my hand and the Official seal of the County Court this the 18th day of August, 1909.

C. L. SMITH,
*County Stenographer and ex-Officio Clerk County Court.*

I hereby certify that this instrument was filed for record on the 18th day of August A. D. 1909, at 1 o'clock P. M.

C. C. LEACH,
*Register of Deeds,*
By NORA ROBINSON,
*Deputy.*

*Endorsements on Back:*

STATE OF OKLAHOMA,
*County of Hughes, ss:*

I, C. C. Leach, Register of Deeds in and for the County and State above named, do hereby certify that the foregoing is a true and correct copy of a like instrument now of record in my office in Book of Deeds at Pages 4-5.

Witness my hand and official seal this — day of Sept. 1910.

C. C. LEACH,
*Register of Deeds,*
By NORA ROBINSON,
*Deputy.*

Filed Sept. 13, 1910, E. F. Messenger, Clerk.

38 Be it also remembered that on the 7th day of October, A. D. 1910, there was filed in the office of the Clerk of the District Court in and for Hughes County, State of Oklahoma, by the Defendants herein, a demurrer; which said demurrer is in words and figures as follows, to-wit:

39 In the District Court of the County of Hughes, State of Oklahoma.

LENA PIDGEON, JIMMIE LARNEY, and JOSEPH PIDGEON and JAKEman Pidgeon, Minors, by John Pusley, Next Friend, Plaintiff,
vs.
WILLIAM BUCK, WILLIE HARJO, JOHN PIDGEON, and MATE PIDGEON, Defendants.

*Demurrer.*

Comes now the defendants and demurs to the petition of the Plaintiffs herein and for reason says:

That said petition does not state facts sufficient to constitute a cause of action.

J. L. SKINNER,
*Att'y for Defendants.*

Endorsed on back: 606. Lena Pidgeon et al., by John Pusly next friend vs. William Buck et al., Demurrer. Filed Oct. 7, 1910, E. F. Messenger, Clerk of District Court, Hughes County.

40 That thereafter, and on the 28th day of June, A. D. 1911, counsel for both Plaintiffs and Defendants in said cause filed in said court an agreement that all former orders made in said cause by the Court, might be set aside, which said agreement is in the words and figures following to-wit:

In the District Court of Hughes County, State of Oklahoma.

LENA PIGEON et al., Plaintiffs,
vs.
WILLIAM BUCK et al., Defendants.

Comes now the counsel for both plaintiffs and defendants in the above-styled suit and agree that all former orders herein, including the order sustaining the demurrer of defendants to the petition of plaintiffs may be set aside by the court and the case re-submitted on said demurrer to the court for immediate action herein by the court.

June 28th, 1911.

LEWIS C. DAWSON,
*Counsel for Plaintiffs.*
J. L. SKINNER,
*Counsel for Defendants.*

On the back of said agreement, omitting the number and title of said cause appears the following endorsement: Filed June 28, 1911, T. E. Neal, Clerk, by A. F. Hall, Deputy.

41 That thereafter, and on the 28th day of June, A. D. 1911, the Court made an order setting aside all former orders made in said cause, including the order sustaining said demurrer. And said demurrer was again considered by the Court and again sustained to which plaintiffs excepted. And immediately thereafter plaintiffs filed in said court a motion for a new trial which was considered and overruled by the court to which action of the court plaintiffs again excepted.

The journal entry of said orders and rulings of the court is in the words and figures following, to-wit:

In the District Court of Hughes County, State of Oklahoma.

LENA PIGEON et al., Plaintiffs,
vs.
WILLIAM BUCK et al., Defendants.

This cause came on to be again heard on this the 28th day of June, 1911, whereupon the counsel of record for both plaintiffs and defendants filed their agreement in writing that all former orders made by the court in said cause, including the order sustaining the demurrer of defendants herein, might be set aside by the court and the case resubmitted for immediate trial.

On consideration whereof all former orders herein including the order sustaining said demurrer are hereby vacated and set aside and the case coming to be again heard upon said demurrer the same is hereby sustained to which the plaintiffs except, and the plain-

tiffs refusing to amend their petition herein, this cause is hereby dismissed at the cost of the plaintiffs, to which action of the court the plaintiffs again except. Whereupon came plaintiffs and moves the court to set aside said orders herein made sustaining said demurrer and dismissing this cause, and grant them a new trial, which motion being heard is by the court overruled to which action of the court the plaintiffs again except, and pray an appeal to the Supreme Court of this State and the same is granted, and the plaintiffs are given ninety days from this day in which to prepare and serve a case-made and the defendants are given ten days after being so served with said case-made in which to suggest amend-
42 ments, and the case-made to be settled within ten days after said ten days given to suggest amendment upon five days' notice by any party to this suit; and leave is given plaintiffs to withdraw the case-made herein from the office of the clerk of this court, for the purposes of perfecting this appeal.

JOHN CARUTHERS,
*District Judge.*

On the back of said order and ruling of the court, omitting the number and title of said cause, appears the following endorsement: District Court, County of Hughes, State of Oklahoma. Filed Jun- 28, 1911. T. E. Neal, District Clerk, by A. F. Hall.

43 That thereafter, and on the 28th day of June, A. D. 1911, the plaintiffs filed in said court their motion for a new trial in said cause, which said motion is in the words and figures following, to wit:

In the District Court of Hughes County, State of Oklahoma.

LENA PIGEON et al., Plaintiffs,

WILLIAM BUCK et al., Defendants.

Come now the plaintiffs herein and move the court to set aside the order heretofore made sustaining the demurrer herein and also the order dismissing the cause of action, and grant them a new trial, upon the following grounds:

First. Because the court erred in sustaining the demurrer of defendants herein to plaintiffs' petition:

Second. Because the court erred in dismissing this action and giving judgment against the plaintiffs for costs herein:

Third. Because said orders and each of them are not sustained by sufficient evidence but are contrary to the evidence:

Fourth. Because said orders are contrary to the law governing this case.

Fifth. Because of numerous error of law arising in said cause and duly excepted to by the plaintiffs herein.

LEWIS C. LAWSON,
*Counsel for said Plaintiffs.*

On the back of said motion for a new trial, omitting the number and title of said cause, appears the following endorsements: District Court, County of Hughes, State of Oklahoma. Filed Jun-28, 1911. T. E. Neal, District Clerk, by A. F. Hall, Deputy.

44 The above and foregoing sets out fully and correctly all the pleadings filed in said cause, all motions filed or made, and all rulings and orders made thereon; all exceptions taken by the plaintiffs to such rulings and orders; exception by defendants; the judgment and decree of the court, and exceptions of plaintiffs thereto; and the same is a true and correct statement and complete transcript of all the pleadings, motions, evidence, findings, judgments and proceedings in said cause.

Dated this 19th day of July, A. D. 1911.

LEWIS C. LAWSON,
*Attorney of Record for Plaintiffs.*

In the District Court of Hughes County, State of Oklahoma.

LENA PIGEON et al., Plaintiffs,
vs.
WILLIAM BUCK et al., Defendants.

To the above named defendants and their attorney of record J. L. Skinner:

The above and foregoing case-made is hereby tendered to and served upon you, and each of you, as a true and correct case-made in the above entitled cause, and as a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments and proceedings in the above entitled cause.

Dated this the 19th day of July, A. D. 1911.

LEWIS C. LAWSON,
*Attorney of Record for Plaintiffs.*

We hereby accept and acknowledge due, legal and timely service of the above and foregoing case-made on us, this 19 day of July, A. D. 1911.

CRUMP & SKINNER,
*Attorneys of Record for Defendants,*
By J. L. SKINNER.

45 In the District Court in and for Hughes County, Oklahoma.

LENA PIGEON, JIMMY LARNEY, and JOSEPH PIGEON and JAKEMAN Pigeon, Minors, by Jno. Pusley, the Next Friend of said Minors, Plaintiffs,

vs.

WILLIAM BUCK, WILLIE HARJO, JOHN and MATE PIGEON, Defendants.

*Stipulation of Attorneys.*

It is hereby stipulated and agreed by and between the parties hereto that the foregoing case-made contains a full, true, correct and complete copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had, all the evidence offered and introduced, all the orders and rulings made and exceptions allowed and all of the record upon which the judgment and journal entry in said cause were made; and the same is a full, true, correct and complete case-made; and the said Defendants waives the right to suggest amendments to said case-made and hereby consents that the same may be settled immediately and without notice, and hereby joins in the request of the Plaintiffs that the judge of said Court settle the same and order the same certified to the Clerk of the District Court and filed according to law; and said Defendants hereby waives the issuance of service of summons in error from the Supreme Court of the State of Oklahoma.

LEWIS C. LAWSON,
*Attorneys for Plaintiff.*
CRUMP & SKINNER,
*Attorneys for Defendants.*

46 In the District Court of Hughes County, State of Oklahoma.

LENA PIGEON et al., Plaintiffs,

vs.

WILLIAM BUCK et al., Defendants.

Be it remembered, that on this 7 day of August, 1911, at 1:30 o'clock P. M., at the courthouse, in the city of Holdenville, in the county of Hughes, in the State of Oklahoma, the above and foregoing case-made was presented to me, John Caruthers, judge of the District Court of the ninth judicial district, before whom said cause was tried, to be settled and signed as the original case-made herein, as required by law, by the parties to said cause; and it appearing to me that said case-made has been duly made and served upon the defendants within the time fixed by the order of this court, and in the time and in the manner and form provided by law; that said plaintiffs are present by their attorney, Lewis C. Lawson, and defendants by their attorney, J. L. Skinner, and said defendants

having served and presented no amendments to said case-made, and said case-made, having been examined by me, is true and correct, and contains a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments and proceedings in said cause, I hereby allow, certify and sign the same as the true and correct case-made in said cause and hereby order that the clerk of said court attest the same with his name and the seal of said court, and file the same of record, as provided by law.

Witness my hand, this 7 day of August A. D. 1911.

JOHN CARUTHERS,
*Judge of the District Court in the Ninth Judicial District, Oklahoma.*

Attest:

[SEAL.] T. E. NEAL,
*Clerk of the District Court of Hughes County, Oklahoma,*
By A. F. HALL, *Deputy.*

District Court, County of Hughes, State of Oklahoma, Filed Sep. 12, 1911. T. E. Neal, District *Court* by A. F. Hall, Deputy.

47 [Endorsed:] # 606. Lena Pigeon et al., Plaintiffs, vs. William Buck et al., Defendants. Petition. Lewis C. Lawson, Counsel for pl'ffs. Filed September 13, 1910. E. F. Messenger, Dist. Clerk. Filed Sep. 13, 1911. W. H. L. Campbell, Clerk.

48 And thereafter to-wit, on the 18" day of July, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause.

Supreme Court, July Term, 1912, July 18", 1912, First Judicial Day.

No. 3038.

LENA PIGEON et al., Plaintiffs in Error,
vs.
WM. BUCK et al., Defendants in Error.

And now on this day it is ordered by the court that the motion to advance the above entitled cause on the docket of this Court be, and the same is hereby allowed, and said cause is set for the September 1912 term.

49 And thereafter to-wit, on the 10th day of September, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, September Term, 1912, September 10", 1912, First Judicial Day.

No. 3038.

LENA PIGEON et al., Plaintiffs in Error,
vs.
WILLIAM BUCK et al., Defendants in Error.

And now on this day the above cause is submitted on the record and briefs filed herein.

50 And thereafter to-wit, on the 27th day of November, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

*Supreme Court Proceedings.*

No. 3038.

LENA PIGEON et al., Plaintiffs in Error,
vs.
WM. BUCK et al., Defendants in Error.

And now on this day November 27th, 1912, it is ordered by the court that the order of submission heretofore entered in the above cause be, and the same is hereby set aside, and the cause is set for oral argument December 10th, 1912, at the heel of the docket.

51 And thereafter to-wit, on the 10th day of December, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, December Term, 1912, December 10th, 1912, Seventh Judicial Day.

No. 3038.

L. PIGEON et al., Plaintiffs in Error,
vs.
WM. BUCK et al., Defendants in Error.

And now on this day it is ordered by the court that W. W. Wood be allowed to file amicus curiæ brief in the above cause in ten days, and the cause is submitted on the record and briefs.

52 And thereafter to-wit, on the 15th day of April, 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, March Term, 1913, April 15th, 1913, Seventeenth Judicial Day.

No. 3038.

LENA PIGEON et al., Plaintiffs in Error,
vs.
WILLIAM BUCK et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the lower court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the lower court in the above cause be, and the same is hereby affirmed. Opinion by Turner, J.

53 In the Supreme Court of the State of Oklahoma.

Filed Apr. 15, 1913.

Withdrawn, Corrected and Refiled Apr. 23, 1913.

No. 3038.

LENA PIGEON et al., Plaintiffs in Error,
vs.
WILLIAM BUCK et al., Defendants in Error.

*(Syllabus by the Court.)*

Mansfield's Digest of Ark. Chap. 49, provides that on the death of a person intestate, unmarried, and leaving no children, the estate, if it come from the father, shall go to the father, and if from the mother shall go to the mother.

"But if the estate be a new acquisition it shall ascend to the father for his lifetime and then descend in remainder to the collateral kindred of the intestate."

Held, that the allotment of a full blood citizen of the Creek Nation, duly enrolled as such, who died on July 12, 1905, after receiving her certificates and patents thereto, was not a new acquisition, but came to her by the blood of her tribal parents, who on her death took full title thereto to the exclusion of the brothers and sister of the deceased, all of full blod. Following Shulthis vs. M'Dougal, et al., 170 Fed. 529.

Error from the District Court of the County of Hughes.

John Caruthers, Judge.

Affirmed.

Charles F. Bliss, Lewis C. Lawson, Counsel for Plaintiffs in error.
Crump & Skinner, Attorneys for Defendants in error.

54 *Opinion of the Court.*

By TURNER, *J.:*

On September 13, 1910, plaintiffs in error, Lena Pigeon, Jummie Larney, Joseph Pigeon and Jakeman Pigeon the last two named minors, by Jno. Pusley their guardian, sued, in the District Court of Hughes County, the defendants in error, William Buck, Willie Harjo, John Pigeon and Mate Pigeon, to clear their title.

The petition substantially states that Lowiney Harjo, a full blood citizen of the Creek Nation and duly enrolled as such, on July 12, 1905, after receiving her certificates and patents thereto, died intestate, seized — her allotment (describing it) in the Creek Nation; that she left no child or children, or their descendants her surviving; leaving her surviving, plaintiffs; Lena Pigeon, Jimmy Larney, Joseph Pigeon and Jakeman Pigeon and her father and mother, John Pigeon and Mate Pigeon, also her husband Willie Harjo, all full blood citizens of the Creek Nation and duly enrolled as such; that thereafter the father and mother and the husband of deceased conveyed said land by warranty deed to the defendant William Buck, which was duly approved by the County Court of Hughes County and filed for record; that the plaintiffs brothers and sister of deceased are her sole heirs, and as such entitled to inherit the property because they say the same was a new acquisition; and prayed that the court so adjudge and decree and clear their title of the deeds made by the father and mother to said Buck. To the judgment of the court sustaining a demurrer to their petition, plaintiffs bring the case here.

Both sides agree that the devolution of this allotment is governed by chapter 49 of Mansfield's Digest of the Statute- of Arkansas and particularly sub section 2 of Sec. 2,522, construed in connection with sec. 2,531. Said sub section reads:

55 "If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts."

And section 2,531:

"In cases where the intestate shall die without descendants, if the estate comes by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his life-time, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her life-time, then to descend to the collateral heirs as before provided."

That the land in question was not a new acquisition and pursuant to these sections when construed together passed to John Pigeon and Mate Pigeon, the father and mother of the deceased, is no longer an open question in this jurisdiction, having in effect been decided by the Circuit Court of Appeals for the Eighth Circuit in Shulthis v. M'Dougal, 170 Fed. 529. There Andrew J. Berryhill,

son of George Franklin Berryhill, a member of the Creek Nation of mixed blood and Clementine Berryhill, his wife, a non-citizen of that tribe died seized of an allotment.

In determining who took the estate the court construed these two sections together, and held the person to be George Franklin Berryhill, the father of the deceased, and in passing said:

" * * * But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it can not be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect *to* by the
56 act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership to the tribe. It was his birthright. It came to him by the blood of his tribal parent, and not by purchase. In applying the Arkansas statute, we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands not as a new acquisition by him, but as an inheritance from his parents as members of the tribe. His father was the only parent through whom he derived his right, and to his father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the parents equally.

Many titles to lands on the Eastern side of this State have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property there (De Walt vs. Cline et al., 128 Pa. 121; MaHarry vs. Eatman, 29 Okla. 46; Duff et al., vs. Keaton et al., 33 Okla. 92) we hold that John Piegon and Mate Pigeon, his wife, are the persons to whom on the death of the allottee, this estate passed in equal moieties and that plaintiffs in error, defendants below, have no interest therein. For that reason the court did not err in sustaining the demurrer to their petition.

The judgment is affirmed.

57 And thereafter to-wit, on the 23rd day of April, 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

*Supreme Court Proceedings.*

No. 3038.

LENA PIGEON et al., Plaintiffs in Error,

vs.

WM. BUCK et al., Defendants in Error.

And now on this 23rd day of April 1913, it is ordered by the court that the opinion of the court heretofore filed herein, to-wit on April 15 1913, be and the same is hereby withdrawn for correction, the same is corrected and as so corrected is hereby re-filed.

58 And thereafter to-wit, on the 29th day of April, 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

*Supreme Court Proceedings.*

No. 3038.

LENA PIGEON et al., Plaintiffs in Error,
vs.
WM. BUCK et al., Defendants in Error.

And now on this 29th day of April 1913, it is ordered by Hayes, C. J., that the mandate of this court in the above cause he stayed pending hearing of petition for rehearing filed herein.

59 In the Supreme Court of the State of Oklahoma.

No. 3038.

LENA PIGEON et al., Plaintiffs in Error,
vs.
WILLIAM BUCK et al., Defendants in Error.

To defendants in error or to Crump & Skinner, their counsel of record herein:

Take notice that on the 29th day of April, 1913, the plaintiffs in error in the above-styled case, will file a motion before said court for a rehearing therein, asking that the decision therein rendered by said court on the — day of April, 1913, be set aside, vacated and said cause decided in favor of said plaintiffs in error.

This the 28th day of April, 1913.

LEWIS C. LAWSON,
*Counsel for said Defendants in Error.*

We, Crump & Skinner, of counsel for defendants in error in the above-styled cause hereby accept service of the above notice and a copy of the motion for rehearing therein to be filed as therein designated.

This the 28th day of April, 1913.

CRUMP & SKINNER,
*Counsel for said Defendants in Error.*

60 In the Supreme Court of the State of Oklahoma.

No. 3038.

LENA PIGEON et al., Plaintiffs in Error,
vs.
WILLIAM BUCK et al., Defendants in Error.

*Petition for Rehearing.*

Comes now the plaintiffs in error in the above styled suit, and present this as their petition for a rehearing before said court on a decision therein rendered on the — day of April, 1913; and for grounds thereof and for the reversal of said decision, assign the following reasons:

First. That said decision is predicated upon the decision rendered by the Eighth Circuit Court of Appeals of the United States, in the case of Shulthis vs. McDougal et al., 170 Fed. 529, cited in said decision, in which case ehe lands therein involved passed by purchase to the owners thereof, under and by reason of an Act of Congress, entitled "An act to ratify and confirm a supplemental agreement with the Creek tribe of Indians, and for other purposes," and especially section seven thereof, and of which said lands, Andrew J. Berryhill was not seised or possessed at the time of his death, nor did he have any right, title or interest in said lands at any time during his life time; but said act of Congress and the right thereunder to said lands involved in said Shulthis case arose long after the death of said Andrew J. Berryhill at which time said decedent nor any one else had even a potential right, title, interest or estate in or to said lands; whereas, in the case at bar, Lowiney Harjo was seised and possessed of her said lands, and, on her death on July 12th, 1905, said lands passed by descent to her lawful heirs, according to chapter 49 of the Statutes of Arkansas, *but* in force in Indian Territory by said act of Congress and another act of Congress passed on the 28th of April, 1904, entitled "An act to provide for additional United States Judges in the Indian Territory, and for other purposes"; and that, therefore, said Shulthis decision wherein it attempts to determine the laws of descent and distribution governing the descent of lands arising under said acts of Congress, and especially wherein it holds that such lands would descend equally to the father and mother of such a deceased child, is obiter dictum,

61 as such matters were not involved in the decision of said case, the said Andrew J. Berryhill having been both born and deceased before said Act was passed or said estate in said lands thereby created, and, therefore, had no right, title or interest in said lands at any time during his lifetime or thereafter.

Second. That said Lowiney Harjo departed this life, intestate, on the 12th day of July, 1905, seised and possessed of said lands in controversy herein, whereupon her said lands passed by descent to her lawful heirs under said chapter 49, immediately upon her

death, and the rights and interests of such heirs vested in said lands on said date of her death, and were therefore, vested rights therein long prior to the date of the decision of said case of Shulthis vs. McDougal et al.; and said decision could not divest such heirs of their inherited rights to said lands either directly or by operation of law arising therefrom or thereunder; and, therefore, said decision does not have a controlling influence in the decision of the case at bar; nor does the same preclude this court from deciding the case at bar on the matters presented by the record thereof, independently of said decision.

Third. That the interest and estate of the plaintiffs in error to said lands arise under and by reason of said acts of Congress and the Original Creek Agreement mentioned and referred to in said first named act, and partake of the nature and character of contractual rights therein, as so provided in said acts, as part consideration for the allotment of said lands of the Creek Nation, Choate vs. Trapp, 224 U. S. 665, 56 Law ed. 941; and such rights must be determined strictly according to said chapter 49, whose meaning and construction must be determined by the construction thereof given it by the Supreme Court of the State of Arkansas, prior to its adoption by Congress for Indian Territory, and such construction is binding alike on all courts, Robinson & Co. vs. Belt, 187 U. S. 41, 47 Law ed. 65.

Fourth. That said decision of Shulthis vs. McDougal et al., 170 Fed. 529, does not constitute a Rule of Property, The Madrid, 40 Fed. 677; and American Mort. Co. vs. Hopper, 64 Fed. 553, 12 C. C. A. 293; for, the case at bar, being appealable by writ of error to the Supreme Court of the United States that court becomes the court of last resort in such matters, and it alone can lay
62 down a rule of property.

Fifth. The decision in the case at bar, being based upon said decision in Shulthis vs. McDougal, we respectfully submit that, for the reasons embraced in the foregoing grounds, applicable to that decision, the court came to an erroneous conclusion in its decision herein in holding that the lands in controversy are not a new acquisition; that, on the death of Lowiney Harjo, they passed by descent, under said chapter, in equal parts to the father, John Pigeon, and mother, Mate Pigeon, to the entire exclusion of the plaintiffs in error; and that said decision in Shulthis vs. McDougal et al., constitutes a rule of property, and binding on this court and the parties to this suit.

For the reasons herein assigned, the plaintiffs in error pray that they be given a re-hearing herein and that said decision herein rendered be reversed and set aside and said cause be decided in *this* favor as heretofore prayed etc.

LEWIS C. LAWSON,
*Counsel for Plaintiffs in Error.*

Endorsed on the back as follows: 3038 Petition for rehearing. Filed Apr. 29, 1913, W. H. L. Campbell, Clerk. Overruled.

And thereafter to wit, on the 6th, day of May, 1913, in
63 the Supreme Court of Oklahoma, the following proceedings were had in said Court:

Supreme Court, March Term, 1913, May 6th, 1913, Twenty-Second Judicial Day.

No. 3038.

LENA PIGEON et al., Plaintiffs in Error,
vs.
WILLIAM BUCK et al., Defendants in Error.

And now on this day the above cause comes on for hearing before the court upon the petition for a rehearing filed herein, and the court having considered the same finds that said petition for rehearing should be denied, and it is so ordered.

64 In the Supreme Court of the State of Oklahoma.

No. 3028.

LENA PIGEON et al., Plaintiffs in Error,
vs.
WILLIAM BUCK et al., Defendants in Error.

*Certificate:*

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing 63 pages, numbered from 1 to 63, both inclusive, are a full true and complete transcript of the record and all proceedings in said court in the above entitled cause, as the same remain on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said court, at Oklahoma City, Oklahoma, this 23d day of May, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
*Clerk of the Supreme Court of the State of Oklahoma,*
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 23,754. Oklahoma Supreme Court. Term No. 199. Lena Pigeon, Jimmy Larney, and Joseph Pigeon and Jakeman Pigeon, minors, by John Pusley, as their next friend, plaintiffs in error, vs. William Buck, Willie Harjo, John Pigeon, and Mate Pigeon. Filed June 16th, 1913. File No. 23,754.

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# CASES CITED.

*In the*

**SUPREME COURT OF THE UNITED STATES.**

**October Term, 1914.**

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**No. 199.**

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**LENA PIGEON, JIMMY LARNEY, and JOSEPH PIGEON and JAKEMAN PIGEON, Minors, by JOHN PUSLEY, as Their Next Friend, *Plaintiffs in Error,***

***vs.***

**WILLIAM BUCK, WILLIE HARJO, JOHN PIGEON and MATE PIGEON, *Defendants in Error.***

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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# BRIEF *for* PLAINTIFFS IN ERROR.

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## Statement of the Case.

This case involves one hundred and sixty acres of land situated in Hughes County, State of Oklahoma, which was owned by Lowiney Harjo at the time of her death, which occurred on the 12th day of July, 1905. The said Lowiney Harjo, as well as the plaintiffs in error and defendants in error, are all full blood Creek Indians and members of the

Creek Tribe of Indians and were duly so enrolled by the Dawes Commission. These lands consist of the Northeast Quarter of Section 36 of Township Nine North, and Range Nine East, and was the allotment of the said Lowiney Harjo set apart and patented to her in her lifetime and of which she died seized and possessed. She died intestate on the 12th day of July, 1905, and left her surviving the plaintiffs in error as her brothers and sister, and the defendant in error, Willie Harjo, her husband, and John Pigeon, her father, and Mate Pigeon, her mother. After her death the said Willie Harjo, John Pigeon and Mate Pigeon made deeds to defendant in error, William Buck, for said allotment, and part of said deeds were approved by the County Court of said Hughes County. Before her death the said Lowiney Harjo leased said allotment, and the tenancy had not expired at the time of her death or when this suit was instituted.

It is the contention of the plaintiffs in error, who were the brothers and sister of said Lowiney Harjo, that upon her death, intestate, and without children or issue, that said lands descended to them in fee simple, with a life estate in succession to her father, John Pigeon, and mother, Mate Pigeon; but the lower courts held that on her death said lands ascended to her said father and mother in equal parts, and that their deeds to said William Buck for said lands and the approval thereof by said County Court passed the fee simple title to said Buck.

To test these matters, the plaintiffs in error instituted a suit against the defendants in error in the District Court of Hughes County, Oklahoma, about the 13th day of September 1910. To their petition thus filed, defendants in error interposed a demurrer on the ground that "said petition does not state facts sufficient to constitute a cause of action". On about the 28th of June, 1911, this demurrer came on to be heard by said District Court and was sustained by the court, and the plaintiffs in error refusing to amend their petition, judgment was rendered against them and in favor of said Buck for the lands in controversy, holding that the plaintiffs in error had no right, title or interest in or to said lands. From this decision an appeal was taken to the Supreme Court of said state, and in April, 1913, said judgment was affirmed by said Supreme Court, and this Writ of Error has been perfected from the decision of said Supreme Court.

## SPECIFICATION OF ERRORS RELIED UPON.

The errors of said state courts relied upon by the plaintiffs in error in this case, are as follows:

*First.*

That said Supreme Court of said State of Oklahoma erred in said matter and cause in holding that, under Chapter 49 of the Statutes of Arkansas, and Sections 2522 and 2531 thereof, put in force and effect under the Acts of Congress of the United States hereinafter mentioned, in the Indian Territory, on the 30th day of June, 1902, and 28th of April, 1904, respectively, "the allotment of a full blood citizen of the Creek Nation, duly enrolled as such, who died on July 12, 1905, after receiving her certificates and patents thereto, was not a new acquisition, but came to her (Lowiney Harjo), by the blood of her tribal parents, who on her death took full title thereto to the exclusion of the brothers and sister (plaintiffs in error) of the deceased (Lowiney Harjo), all full bloods".

*Second.*

That said court also erred in holding that "the land in question was not a new acquisition, and pursuant to said sections when construed together passed to John Pigeon and Mate Pigeon, the father and mother of the deceased, is no longer an open question in its jurisdiction, having in effect been de-

cided by the Circuit Court of Appeals for the Eighth Circuit in *Shulthis* v. *McDougal,* 170 Fed. 529."

*Third.*

That said court also erred in holding "many titles to lands on the eastern side of this (said) state have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property there", there being no facts established by the record herein showing that said decision had become a rule of property in the eastern part of said state; and said decision not having been rendered by a court of last resort having ultimate jurisdiction of the matters therein, or in the case at bar, involved, the same could not, in said jurisdiction of said state, become a rule of property conclusively binding upon said plaintiffs in error, or upon said Supreme Court of said state in passing upon the right, title and interest of said plaintiffs in error, in and to said lands involved in this suit.

*Fourth.*

That said court also erred in holding that "John Pigeon and Mate Pigeon, his wife, are the persons to whom on the death of the allottee (Lowiney Harjo), this estate passed in equal moities and that plaintiffs in error, plaintiffs below, have no interest therein"; and that "for that reason, the (said District) court did not err in sustaining the demurrer to their petition."

*Fifth.*

That said court erred in holding that, upon the death of said Lowiney Harjo, the plaintiffs in error took no right, title, interest or estate in or to said lands in controversy; but that said lands and all right, title and interest therein, passed to said John Pigeon and Mate Pigeon in equal moieties, to the entire exclusion of the said plaintiffs in error; and for said reasons affirming the said judgment and decree of said District Court.

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Plaintiffs in error further say that said judgment and decision of said Supreme Court of the State of Oklahoma is repugnant to and in conflict with the fourteenth amendment to the Constitution of the United States and with two Acts of Congress, one entitled, "An Act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians, and for other purposes", and especially Section 6 thereof, which reads as follows:

> "The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided,* That only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation: And *pro-*

> *vided further,* That if there be no persons of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said Chapter 49";

and said other act is entitled, "An Act to provide additional United States Judges in the Indian Territory, and for other purposes," and especially Section 2 thereof, which reads as follows:

> "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operations, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the District Courts in said Territory in the settlements of all estates of decedents, the guardianship of minors and incompetents, whether Indians, freedmen, or otherwise" (passed on the 28th of April, 1904).

Plaintiffs in error further state that said Supreme Court of the State of Oklahoma is the highest court of said state in which a decision in this suit could be had; that the right, title and interest of the plaintiffs in error, in and to said lands in controversy in this suit, were derived from, and arose out of, said Acts of Congress mentioned in this proceeding, and especially said last two acts above named and the said sections herein set forth, and said Chapter 49 of Arkansas put in force in said Indian Territory under, and as provided in, said Acts of Congress; that, in said suit and proceedings

thereof, as shown by the record, proceedings and papers in this case, and the decision of said Supreme Court of said state, the plaintiffs in error specially set up and claimed said lands under and by reason of said Acts of Congress; and that, by its decision rendered in this suit, said Supreme Court denied to the plaintiffs in error all right, title, interest and estate in and to said lands, and decreed the same to said John Pigeon and Mate Pigeon, and thereby indirectly to said defendant in error, William Buck, under and by reason of said deeds so made to him by said John and Mate Pigeon, in fee simple forever. And to which said judgment and decision of said Supreme Court, plaintiffs in error except, and assign the same as error on the grounds above given.

## Pleadings, Orders and Decrees, as Shown by the Record.

**Sections 2522 and 2531 of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas.**

"*Section 2522.* When any person shall die, having title to any real estate of inheritance, or personal estate, *(b)* not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

*First.* To children, or their descendants, in equal parts.

*Second.* If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

*Third.* If there be no children, nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts."

"*Sec. 2531.* In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act;

and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided *(d)*."

**Agreement of Counsel for Plaintiffs in Error and Defendants in Error, as to the Brief in This Cause.**

"*In the Supreme Court of the United States. October Term, 1914. No. 199. Lena Pigeon, Jimmy Larney, and Joseph Pigeon and Jakeman Pigeon, Minors, by John Pusley, as Their Next Friend, Plaintiffs in Error,* v. *William Buck, Willie Harjo, John Pigeon, and Mate Pigeon.*

As the matters of law involved in the above styled suit are fully discussed in the brief of counsel for plaintiff in error, in the case of *George Washington, Plaintiff in Error,* v. *Charles W. Miller, Defendant in Error, No.* ~~226~~ 53, and now pending in the said Supreme Court, at the present term thereof, it is hereby agreed between counsel for defendant in error and for plaintiff in error in the above styled case, that the brief in said *Washington-Miller* case of the counsel for plaintiff in error therein may also be read in the above styled case by said Supreme Court, as part of the brief of counsel for plaintiff in error herein, a printed copy of said brief being received and hereby acknowledged by counsel for said defendants in error, this the 5th day of September, 1914.

LEWIS C. LAWSON,
*Counsel for Plaintiffs in Error.*

J. L. SKINNER,
*Counsel for Defendants in Error.*"

## ARGUMENT OF COUNSEL FOR PLAINTIFFS IN ERROR.

FIRST ASSIGNMENT OF ERROR.

**That said Supreme Court of said State of Oklahoma erred in said matter and cause in holding that, under Chapter 49 of the Statutes of Arkansas, and Sections 2522 and 2531 thereof, put in force and effect under the Acts of the Congress of the United States hereinafter mentioned, in the Indian Territory, on the 30th of June, 1902, and 28th of April, 1904, respectively, "the allotment of a full blood citizen of the Creek Nation, duly enrolled as such, who died on July 12, 1905, after receiving her certificates and patents thereto, was not a new acquisition, but came to her (Lowiney Harjo), by the blood of her tribal parents, who on her death took full title thereto to the exclusion of the brothers and sister (plaintiffs in error) of the deceased (Lowiney Harjo), all full bloods."**

This case is reported in the 38th Oklahoma, page 101, and 131st Pacific, page 1083; and while it embraces only 160 acres of land of only a few thousand dollars in value, still, the principle of law which must ultimately govern the disposition of this character of land is one of the greatest importance to the members of the Five Civilized Tribes and to all other persons occupying the eastern portion of the State of Oklahoma. It is the contention

of the plaintiffs in error that the allotments of these tribes in the hands of the original allottee were new acquisitions in every instance; and on the death of the allottee still seized and possessed of his allotment, intestate, and without issue, such lands are governed absolutely by Section 2531 of Chapter 49 of Arkansas, where such death occurred while said chapter was in force and effect in the Indian Territory, as in the case at bar. This same principle or feature of this case is involved in the case of *Washington* v. *Miller,* No. 336, now pending before this court and submitted at this term of court; and in our brief in that case we have gone to considerable extent in presenting this feature; and by the kindness of counsel of record for the defendants in error in this case, as shown on page eleven of this brief, the original agreement having been sent to the clerk of this court, it is agreed that the brief we have prepared in the *Washington-Miller* case may be read and considered by this court in the present case, as that brief comprises about two hundred pages devoted to this feature and in which numerous decisions and authority are cited to support the contentions of the plaintiffs in error in the present case.

In that brief, we have tried to give the law and decisions distinguishing ancestral estates and new acquisitions both at common law and under said Chapter 49 of Arkansas, and to show that these allotments in the hands of the original allottees were

new acquisitions as so defined in said Section 2531 of said Chapter 49 of Arkansas; and thereby to illustrate by these numerous decisions, and especially the decisions of the Supreme Court of Arkansas construing said chapter before its adoption by Congress and put in force in Indian Territory, that such allotments were new acquisitions, and that the case of *Shulthis* v. *McDougal,* 170 Fed. 529, relied upon absolutely by the Supreme Court of Oklahoma in rendering its opinion in the case at bar, is erroneous, and is not in accordance with said chapter or the decisions governing these matters. It would, therefore, add nothing to this brief or be of any additional benefit to this court for us to again go over the same matters in the case at bar, as this court now has that case under consideration and there are several other cases involving the same principle now pending in the court besides the case at bar, and which, we understand, are sought to be heard in connection with the present case.

However, the case at bar has some special features which did not arise in the *Washington-Miller* case; and that case had features which had no connection whatever with the present case; but whether the estates were ancestral or new acquisitions arose in each of these cases, and in the present case it is the main principle and feature to be determined.

In the case at bar, the allottee, her father, mother, brothers and sister, and all parties concerned in her allotment, were full-blood Creek citizens and

members of the Creek Tribe of Indians. Consequently, the provisos contained in Section 6 of the Supplemental Creek Agreement, approved by Congress on the 30th of June, 1902, have no force or effect upon the present case, and left the land to pass by descent under Chapter 49 of Arkansas, as provided in said Supplemental Agreement, the same as if no such provisos had been contained in said Section 6 thereof. Besides, on the 28th of April, 1904, Congress passed another act referred to in this case and the record thereof, whereby all the Statutes of Arkansas which had theretofore been in force in the Indian Territory were continued and made applicable to all persons and estates in Indian Territory, whether freedmen, Indians or otherwise; and that law or Act of Congress was in full force and effect at the time Lowiney Harjo died, on the 12th day of July, 1905. The record discloses that prior to her death these lands had been allotted and patented to Lowiney Harjo and that she died seized and possessed thereof. This fact is not disputed, but conceded to be true by the demurrer interposed by the defendants in error, and on which alone they relied in the trial of this case in the courts below. Hence, it is now beyond dispute that the lands in controversy passed by descent to the heirs of Lowiney Harjo at the time of her death, on the 12th of July, 1905; and that, these heirs and the descent must be determined by Chapter 49 of Arkansas, put

in force in the Creek Nation by said Supplemental Agreement, and throughout Indian Territory by said Act of April 28, 1904. In the case of *Shulthis* v. *McDougal,* so relied upon by said state courts in the case at bar, the lands there involved passed by purchase and not by descent, and were never owned by the so-called allottee in his lifetime, nor was he even entitled to the same at any time during his lifetime; but said estate arose alone out of the express provisions of said Supplemental Creek Agreement, as may be seen from a statement of that case on page 531 of the 170th Federal Report, where it is shown that the said Andrew J. Berryhill was born on the 6th day of May, 1901, and died in the month of November of the same year. Therefore, Andrew J. Berryhill was not provided for in the Original Creek Agreement, and under that agreement was not entitled to an allotment at any time during his life; but by Section 7 of the Supplemental Creek Agreement, which became effective on the 8th of August, 1902, it is provided:

> "All children born to those citizens who are entitled to enrollment as provided by the Act of Congress approved March 1, 1901 (31 Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission."

That said section further provides:

> "And if any such child has died since May 25, 1901, or may hereafter die before receiving

his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

Thus it will be seen that this child, Andrew J. Berryhill, came squarely within the provisions of said Section 7; and at no time during his lifetime was he even entitled to an allotment out of the domain of the Creek Nation, under any law that existed during his lifetime; but that the estate or lands involved in that case, as well as the law that created and disposed of it, arose after the death of said Andrew J. Berryhill. It is therefore too plain for dispute that said child never had any estate in the lands involved in that case, and was never entitled to the same or such lands, at any time while living; but that under the express provisions of that section, the lands thus provided for vested for the first time in his heirs when set apart as provided in those treaties, and that such heirs were to be determined by Section 6 of said Supplemental Agreement; but they took the same as first purchasers and not as heirs of Andrew J. Berryhill, under the express provisions of that section. In other words, the so-called heirs of Andrew J. Berryhill, by reason of said Section 7, were given by this Act of Congress these lands in addition to what they were previously entitled to under said Creek treaties in their own individual rights, as members of said tribe. Then

how could such lands in the hands of said so-called heirs or otherwise be stamped as ancestral, when in both law and fact such lands never before belonged to a human being? Chapter 49 of Arkansas as so modified by Section 6 of said Supplemental Creek Agreement was expressly made the law of descent thereunder in said Creek Nation; and in said chapter estates are divided into ancestral and a new acquisition. Section 2543 of said chapter is as follows:

> "*Sec. 2543.* The expression used in this act, 'where the estate shall have come to the intestate on the part of the father,' or 'mother,' as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise or descent from the parent referred to, or from any relative of the blood of such parent."

And section 2541 thereof is as follows:

> "The term 'inheritance,' as used in this act, shall be understood to mean real estate, as herein defined, descended according to the provisions of this act."

Then, it follows, that under the express provisions of said Chapter 49 in order for lands to be ancestral they must have descended according to the provisions of this act; and "the inheritance" must have "*come to the intestate by gift, devise or descent from the parent referred to, or from any relative of the blood of such parent.*"

Did the lands involved in that *Shulthis* decision "descend" to Andrew J. Berryhill? Certainly not;

for he never owned the same nor had an interest therein, or a right thereto, at any time during his lifetime. Then on his death, did such lands come to any of his so-called heirs by gift, devise or descent from his parents, or from any relative of the blood of such parent, as is expressly provided in said chapter must be the case before said lands can be ancestral? Certainly not; for under said Section 7 of said Supplemental Creek Agreement, said lands passed when segregated directly to said so-called heirs as the first purchasers; and as the first owners thereof in fee simple and as human beings, for no human being had prior to said act and the segregation of such lands ever had an interest therein or had ever been entitled to the same. In our humble opinion the same could be said of every other allotment in the Five Civilized Tribes in the hands of the original allottee, arising out of these recent treaties; and that each allotment while so held by the original allottee is a clear case of a new acquisition, and has no qualities whatever of an ancestral estate as defined by either the common law or Chapter 49 of Arkansas, which enlarged the common law meaning of an ancestral state. As shown by the numerous decisions of this court cited in our brief in *Washington-Miller* case, it has been repeatedly held that prior to these recent treaties the members of the Five Civilized Tribes had no individual or separate interest or estate in the lands of these respective tribes; under these respective treaties,

these several members did acquire vested interests and the estate in fee simple to their respective allotments, which they never enjoyed before such treaties. When and how did these vested rights in such allotments arise? They arose, of course, under the terms and provisions of these treaties and subsequent Acts of Congress; and were created for the first time by such acts and treaties. Prior to such treaties the lands of these tribes were held by this court to be public lands, and therefore not susceptible of private ownership in severalty; but the title thereto was held by the tribe in the nature of a base or qualified fee, and to endure in that condition only so long as Congress saw proper to permit it, as so held in effect, in the case of *Fleming* v. *McCurtain,* and other cases cited in said brief. The allotments in severalty of these lands to the members of these tribes therefore came to the respective members simply as a gift from the Federal Government to be used, held and enjoyed in fee simple to them and their heirs, according to the provisions of these respective treaties and subsequent Acts of Congress. But to this it may be suggested that these several treaties were contractual in their nature, based upon a valid consideration, and that all these allotments rest upon the consideration of this change in the occupancy of these lands in common to that of severalty in each respective allotment. If so, and to some extent perhaps that position is tenable, still this would not stamp

such allotments as ancestral, or, in my judgment at least, impart to them any of the qualities of an ancestral estate. In *Gritts* v. *Fisher*, 56 L. ed. 931, this court held:

> "During the last twenty years Congress has enacted a series of laws looking to the allotment and distribution of the lands and funds of the Five Civilized Tribes, of which the Cherokee tribe is one, among their respective members, and to the dissolution of the tribal governments. An extended statement of these laws, so far as they concern the Cherokees, as also of the title by which their lands and funds have been held and of the relations of the tribe and its members to the United States, will be found in *Stephenson* v. *Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Cherokee Intermarriage Cases*, 203 U. S. 76, 51 L. ed. 96, 27 Sup. Ct. Rep. 29; *United States ex rel. Lowe* v. *Fisher*, 223 U. S. 95, *ante*. 364, 32 Sup. Ct. Rep. 196, and *Heckman* v. *United States*, 224 U. S. 413, *ante*. 820, 32 Sup. Ct. Rep. 424.
>
> Anterior to this legislation the lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was not alienable or descendible. And when children were born into the tribe they became thereby members, and entitled to all the rights incident to that relation. Under treaties with the United States the tribe maintained a government of its own, with leg-

islative and other powers, but this was a temporary expedient, and in time proved inefficient and unsatisfactory. As in the instance of other tribal Indians, the members of this tribe were wards of the United States, which was fully empowered, whenever it seemed wise to do so, to assume full control over them and their affairs, to determine who were such members, to allot and distribute the tribal lands and funds among them, and to terminate the tribal government. This Congress undertook to do. The undertaking was a large one and difficulties were encountered. The first legislation was largely preliminary and experimental and need not be specially noticed, because no material change in the situation resulted therefrom."

This case was decided on the 13th of May, 1912, which was three years subsequent to the decision of *Shulthis* v. *McDougal,* and would seem to be in legal consequence the very reverse of the *Shulthis* decision. Here it specifically points out that prior to these recent treaties, the lands and funds were held by the tribe simply as a community, and not by members in severalty or as tenants in common. It further points out that the right of each individual to participate in the enjoyment of such property depended upon his tribal membership; and that, when that terminated by death or otherwise the right was at an end; and that it was not alienable or descendible; and that when children were born into the tribe they became thereby members and entitled to the rights incident to that relation. It, therefore, follows that whenever a child was born to a member

of one of these tribes, that child became a member of that tribe, and as such member it acquired rights identical with its parents and other members of the tribe simply because it was a member of that tribe, and not otherwise. It further follows, therefore, that whatever rights the child acquired in such property and funds, that right arose by reason of the rights of the child itself as such member, and not by right of its parents or any other member or person. The same was true of its parents and every other member of the tribe; and on their death prior to these recent treaties their rights to such property also perished, for the same, as so held in this *Gritts* case, was neither alienable nor descendible. Again, if the consideration for the allotment in fee was the surrender by each member of his communal right of occupancy of the domain of the several tribes, that surrender was made by the child, and on behalf of the child, the same as the parents and other members of the tribe, each yielding his communal right of occupancy and acquiring instead thereof his allotment in fee. So that in every instance, even if the destruction of the communal right of occupancy should be held to be the consideration for the allotment in fee, each member thereby yielded his own right of occupancy in this communal property for an allotment in fee in severalty. So that, from any aspect of the case, these allotments in the hands of the original allottees were not ancestral; nor do they in any manner par-

take of the qualities of an ancestral estate. But on the other hand such allotments are simply gifts of these several allotments in fee to the several allottees, on the part of the federal government; or, if not purely a gift upon the part of the government, the most that can be said is that by these recent treaties contracts were made between the federal government on one hand, and the tribes and their members on the other hand, whereby in consideration that the tribes and their members should voluntarily yield their right of occupancy of their respective domains held in common, the government on the other hand would allot to each of the members a prescribed portion thereof in fee simple, according to the terms and provisions of the treaties. The government had a reversionary interest in all these lands; and under said original grants, all rights of the tribes thereunder could, or might, have been forfeited, and thereby the government become entitled to the fee and also the possession of the domain of these tribes. The government had a perfect right to make with these tribes whatever disposition it saw proper of the lands thus allotted among the members of the tribes. The tribes held the title under a base or qualified fee, subject to the future disposition of Congress; and the government held the reversionary interest in the land; and it was competent for Congress to enter into these recent treaties whereby this communal interest was broken up and a fee in severalty was vested in fee

simple in each allottee to his individual allotment. But, in every instance, whatever right, title or interest each allottee received or obtained in his individual allotment, came to him in his own right and not in right of another, and because he was a member of the tribe and was duly so enrolled as prescribed in the treaties and laws governing his tribe. Consequently, each member of a family who was duly enrolled received his own individual allotment, absolutely independent of the rights of other members of his family or tribe; and received the same regardless of whether he had relatives, and regardless of whether he was an Indian, freedman, or citizen by marriage or adoption, according to the treaty with the tribe of which he was a member.

So that, in conclusion on this feature of the case, aside from what we have presented in our brief in the *Washington-Miller* case, we respectfully submit that in every instance these allotments in the hands of the original allottee were not ancestral, either in nature or character, but were new acquisitions, as so provided and defined in Chapter 49 of Arkansas.

But in the case at bar, the lands actually descended to the heirs at law of Lowiney Harjo; for, at the time of her death on the 12th day of July, 1905, these lands had previously been selected and patented to her, and she died still seized and possessed thereof. As said allotment in her hands was a new acquisition, it descended to her heirs as a

new acquisition under Chapter 49 of Arkansas, which was in force in the Indian Territory at the time of her death; and under section 2531 of said chapter, her father, John Pigeon, and mother, Mate Pigeon, took only life estates in said allotment, and the fee simple title thereto descended to the plaintiffs in error, and the deeds of said father and mother and husband so made to said Buck for said lands did not pass the fee simple title thereto or deprive the plaintiffs in error of the same.

SECOND ASSIGNMENT OF ERROR.

**That said court also erred in holding that "the land in question was not a new acquisition and pursuant to said sections when construed together passed to John Pigeon and Mate Pigeon, the father and mother of the deceased, is no longer an open question in its jurisdiction, having in effect been decided by the Circuit of Appeals for the Eighth Circuit in *Shulthis* v. *McDougal,* 170 Fed. 529."**

This, of course, is the same proposition arising under the first assignment, and is indicative that the Supreme Court of the State of Oklahoma has simply adopted the decision of the Circuit Court of Appeals in this case of *Shulthis* v. *McDougal.* That decision is predicated upon the notion that these allotments are ancestral in character and came from the parents, or at least, in some way through the parents, if both belonged to the same tribe, and

if not then the same came from the parent who was a member of the tribe to which the child belonged; and on the death of the child, if both parents belonged to the same tribe, its allotment passed to them in fee in equal parts; but if both were not members of its tribe, then the whole allotment must go in fee to the parent who was such a member of its tribe, to the total exclusion of the other parent.

If our contention that these allotments are new acquisitions in the hands of the original allottee be correct, then it follows, of course, that this *Shulthis* decision is erroneous; and as a legal consequence, the case at bar which has simply adopted it would likewise be erroneous, at least in the principles of law that govern this case and the quality of the estate in the hands of the original allottee. In order that an estate be ancestral, some ancestor must necessarily have had an interest therein, which preceded the owner thereof at the time of his death and such ancestor must have been related by blood to such owner, as so defined in Chapter 49 of Arkansas. By the express terms of the Original and Supplemental Creek Agreements, each member of the Creek tribe who received an allotment under said treaties thereby became the absolute owner in fee simple thereof by virtue of his own right, and not by right of another; and that was true in a case even where such member died before receiving his allotment, and the allotment was disposed of under Section 28 of the Original Creek Agreement and

similar provisions in other agreements with other tribes. By Section 3 of the Original Creek Agreement each Creek member was to receive 160 acres of land as nearly equal in value as practicable; and by Section 23 thereof he was to acquire the entire fee simple title thereto from the Creek Nation and the reversionary interest of the Federal Government, through patents therein provided to be made and executed by the Principal Chief of said nation, and approved by the Secretary of the Interior and then recorded. Such patents defined the lands, rights and interests of the allottee therein mentioned or his heirs, as prescribed by said treaties, and the same was made to appear upon the face of said patents. No individual rights or interests in such allotments ever preceded that of the allottee therein mentioned or his heirs; and by the acceptance of such patent, the allottee therein relinquished all claim to any other lands except the surplus or unallotted portions of the domain of said Creek tribe. Section 27 of the Act of Congress of April 26, 1906, provides as follows:

> "*Sec. 27.* That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: *Provided,* That

nothing herein contained shall interfere with any allotments heretofore or hereafter made or to be made under the provisions of this or any other Act of Congress."

If the lands of these tribes had been prior to these recent treaties a trust estate or one held in common by members of these respective tribes, it must be conceded that the surplus or unallotted portion of such lands would have remained stamped with the quality, after the several allotments in kind were carved out and allotted to individual members. But, it is here made evident from this section that Congress itself did not regard said lands as such trust estate or one held in common even by the members of said tribes considered as a collective body; for by this section it expressly provides that such lands shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes and their heirs, etc. And even after this act was passed, this court, in *Gritts* v. *Fisher*, 56 L. ed. 928, point 2, held:

"*Constitutional Law—Vested Rights—Indian Allotments.* 2. Vested rights of members of the Cherokee tribe living on September 1, 1902, and enrolled under the Act of July 1, 1902, to participate in the allotment and distribution of the remaining tribal lands and funds, were not destroyed—their individual allotments not being affected—by the provision of the Act of April 26, 1906, Section 2, as amended by the Act of June 21, 1906, for admitting newly-born members of the tribe to the allotment and dis-

tribution from which they were excluded by the earlier act if born after September 1, 1902."

These provisions and this decision would seem to forever set at rest the contention that the lands of said tribes were held in common by the members of said tribe, as the true owners thereof, and that such lands both before and after such allotment were not stamped with any of the characteristics of an ancestral estate; and even since said recent treaties that the surplus or unallotted portion of said lands of said tribes is not a trust estate or one held in common by such members and in which they had vested rights, that could not be disturbed by subsequent Acts of Congress. By this Supplemental Creek Agreement and subsequent Acts of Congress, other members of the Creek Tribe of Indians were allowed allotments out of the domain of that nation, who could not have acquired an allotment under the Original Creek Agreement or any other Act of Congress; and I presume it would not be contended that Congress could not at the present time make other provisions by which children born to such members subsequently to the 4th of March, 1906, could be provided for out of these surplus lands and funds of said tribe. In other words, these unallotted lands and funds are still under the control of Congress and in which the members of these tribes have no vested interest as private individuals. Hence, not even such surplus or unallotted lands can now, since said recent treaties, be held to be ancestral in its

nature and character: and for a greater reason, such lands before allotment and such allotments in the hands of the original allottee cannot be held to be ancestral; but in our opinion should be held as a new acquisition and arising simply as a gift of the federal government to each allottee in his individual right and as the first purchaser thereof in the capacity of a human individual, and not by right of any parent or ancestor or by right of any right, title or interest he may ever have had in or to the same.

THIRD ASSIGNMENT OF ERROR.

**That said court also erred in holding "many titles to lands on the eastern side of this (said) state have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property there", there being no facts established by the record herein showing that said decision had become a rule of property in the eastern part of said state; and said decision not having been rendered by a court of last resort having ultimate jurisdiction of the matters therein, or in the case at bar, involved, the same could not, in said jurisdiction of said state, become a rule of property conclusively binding upon said plaintiffs in error, or upon said Supreme Court of said state in passing upon the right, title and interest of said plaintiffs in error, in and to said lands involved in this suit.**

The opinion of the Supreme Court of Oklahoma

in the case at bar may be seen on pages 32 and 33 of the record; and at the close of that opinion the court observed:

> "Many titles to lands on the eastern side of this state have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property there *(De Walt* v. *Cline et al.,* 128 Pac. 121; *MaHarry* v. *Eatman,* 29 Okla. 46; *Duff et al.* v. *Keaton et al.,* 33 Okla. 92) we hold that John Pigeon and Mate Pigeon, his wife, are the persons to whom on the death of the allottee, this estate passed in equal moieties and that plaintiffs in error, defendants below, have no interest therein. For that reason the court did not err in sustaining the demurrer to their petition.
>
> The judgment is affirmed."

As the cases there cited have reference only to guardian matters, and the last case to the legal effect of an oil and gas lease, etc., it is not apparent how such decisions can be authority for holding either that many titles to lands on the eastern side of this state have been acquired on the strength of this *Shulthis* decision; or that such decision has become a rule of property there. As shown by the record, this case was heard and decided simply on the petition of the plaintiffs in error and the demurrer thereto by the defendants in error, and without any evidence whatever having been adduced by any party or heard by the court on the termination of these matters. The court will observe that the decision in the case at bar does not rest upon

the *correctness* of this *Shulthis* decision; but it is based simply upon that decision as a rule of property "on the eastern side of this state" where it is there held that many titles to lands have been acquired on the strength of this decision. How the state court acquired that information, does not appear from the record in this case; and as a decision cannot rest for its soundness and legality upon matters outside of the record, we are here confronted with a legal proposition whether or not the decision in the case at bar wherein it attempts to hold that this *Shulthis* decision has become a rule of property, can be sustained under any aspect of this case. That the record discloses no facts or evidence from which such a deduction could be drawn, is beyond dispute. Then could the Supreme Court of the State of Oklahoma take judicial notice *first*, that this *Shulthis* decision had in fact become a rule of property; *second*, had, or could, that decision become a rule of property in the eastern part of Oklahoma, even if there had been facts or evidence adduced in the case on that feature?

In the first place let me call the court's attention to the fact that this *Shulthis* decision was rendered on the 3rd day of June, 1909, and from this decision there was an appeal to this court, where the same remained until the 7th day of June, 1912, 56 L. ed. 1206, when it was dismissed by this court on jurisdictional grounds. The decision in the case at bar was rendered on the 23rd of April, 1913, 38

Okla. 101, which is much less than one year subsequent to the time when the *Shulthis* case was dismissed by this court. The fact that the *Shulthis* decision was appealed at once to this court and at the present time there are no less than four other cases now pending before this court disputing the correctness of that decision, namely, *Washington* v. *Miller, Pigeon* v. *Buck, Roberts* v. *Underwood et al.,* and another branch of this same *McDougal* case now being advanced by the court, is conclusive that the profession in Oklahoma have not accepted the correctness of that decision and do not regard that the same has become a rule of property in former Indian Territory; but on the contrary they indicate that the same has not become acceptable to the profession or that the same is a rule of property and that the profession does not rely upon that decision as settling that these allotments in the hands of the allottee are ancestral under Chapter 49 of Arkansas, and on the death of a child allottee the same goes to the father and mother in fee simple either by moieties or entireties.

On this branch of the subject Mr. Bledsoe in his very estimable work, entitled Indian Land Laws (second edition), Section 244, presents the matter as follows:

> "SEC. 244. *Descent—Allotted Lands of the Five Civilized Tribes—Whether Ancestral Estate or a New Acquisition.* Are lands of the allottees of the Five Civilized Tribes, after they pass upon death to their descendants, an ances-

tral estate or a new acquisition under the Arkansas statute of descent and distribution?

If the conditional fee to the tribal lands had been in the members of the tribe, and allotment had meant only partition of an estate, the estate received by the allottee would have been ancestral. Such was not the case. The estate in the land held by a member previous to allotment was a mere right of possession and could be alienated only to a member of the tribe. The estate received by the allottee is an absolute fee simple, including the possibility of reversion vested in the United States prior to allotment. The estate thus received by the allottee is a larger and more valuable one than his previous possessory right. He takes by deed or patent from the Governor or Principal Chief of his tribe, acting on behalf of the tribe and without reference to whether his father or mother or both be living or dead.

For nearly ten years it was practically the unanimous opinion of lawyers residing in the Eastern District of Oklahoma that the estate of the allottee is a new acquisition and not an ancestral estate. This was based upon uniform interpretation given to this statute by the Supreme Court of Arkansas under conditions somewhat similar, though not identical, to those in the Indian Territory.

About the time the bar regarded the matter as settled the Circuit Court of Appeals for the Eighth Circuit held the estate of an allottee of the Creek Nation to be ancestral, and not a new acquisition. A review of this decision was sought in the Supreme Court of the United States, but the case was dismissed for want of jurisdiction.

The Supreme Court of the state has very recently followed the construction given to the Arkansas statute of descent by the Circuit Court of Appeals for the Eighth Circuit, holding the estate received by the allottee in allotment to be ancestral and not a new acquisition. The case involved the construction of the Arkansas statute of descent as applied to a full-blood Creek Indian who died July 12, 1905, after receiving her patent, intestate, leaving surviving her a husband, father, mother, sister and two brothers, all full-blood Creeks. The father, mother and husband joined in a conveyance, and the sister and brothers brought suit to recover the property and clear title thereto.

After quoting from the opinion of the Circuit Court of Appeals in the *Shulthis-McDougal* case the court concludes as follows:

> 'Many titles to lands on the eastern side of this state have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property there. * * * '

A writ of error has been sued out to have the judgment of the Supreme Court of the state in this case reviewed by the Supreme Court of United States.

It is extremely desirable that it be finally adjudged, and without delay, whether the estate received by an allottee of the Five Civilized Tribes is ancestral or a new acquisition, as the uncertainty of the law upon this subject is a source of great embarrassment in the development of the country. The author has never believed the rule prescribed in the case of *Shulthis* v. *McDougal* is sound or in harmony with

either the language of the Arkansas statute or its interpretation prior to its extension over the Indian Territory. Neither does he believe that the rule there declared is capable of affording a solution of the difficulties arising out of the descent of allotted Indian lands.

The ancestral estate under the Arkansas statute is the estate of inheritance under the common law enlarged so as to include a gift, grant, or devise made by either of the parents. In such a case the estate descends to the children and their descendants, and in the absence of children or their descendants it ascends to those of the blood through whom the estate came, to the exclusion of those of the blood of the other parent. In estates of inheritance, in the absence of descendants, the property goes exclusively to the heirs of the deceased who are of the blood of the ancestor from whom the estate came, and in no event does such an estate ascend to any one who is not of the blood of the ancestor.

The new acquisition is substantially the estate by purchase of the common law, limited by having carved out of the same estates by gift, grant, or devise from the parents or either of them. In such a case the estate descends to the children and their descendants, and in the absence of children or their descendants ascends to the father for his lifetime, then to the mother for her lifetime, and then to the collateral kindred in fee; the father's family being given preference only over the mother's family. Under the interpretation given to the Arkansas statute by the Circuit Court of Appeals for the Eighth Circuit and the Supreme Court of the state the courts and lawyers of

the state are presented with the problem of following an ancestral estate through two separate and distinct lines of heirship, something unheard of in ancestral estates, and which probably will be difficult in practical application.

It will be observed that the Circuit Court of Appeals held that, inasmuch as one of the parents was not of Indian blood, the full title passed to that parent who was of Indian blood.

In the case decided by the Supreme Court of the state both parents were of Indian blood and survived the allottee, and it was held that the estate passed in equal moieties to the father and mother. Suppose that the father or mother only had survived, would the entire estate have gone to the survivor, or would it have gone half to the survivor and half to the heirs of the deceased parent? Upon the death of either of the parents without descendants, where both parties survive the allottee, by what rule is the right of descent to be determined?

These are only a few of the perplexing questions that will arise from the establishment of a rule creating two separate and independent ancestors to and from whom the descent of an ancestral estate must be followed."

By an Act of Congress approved on the 27th day of May, 1902, the Creek laws of descent and distribution provided for in the Original Creek Agreement, were expressly repealed and Chapter 49 of Arkansas was thereby put in force in the Creek Nation; but by a joint resolution of its two branches Congress suspended that act until the 1st day of July, 1902, on which date Chapter 49 of Ar-

kansas became the law of descent and distribution of the Creek Nation and thereafter remained in full force and effect without change or modification, until the 8th of August, 1902. On the last named date the Supplemental Creek Agreement took effect, by Section 6 of which said Chapter 49 was put in force in said Creek Nation with certain modifications to the effect that the lands of the Creek Nation must descend to Creek citizens or their descendants if any such existed, and if not then it went to non-Creek citizens. But, as before stated, the whole family involved in this suit were full-blood Creeks; and therefore these provisos have no application in the case at bar. Again, on April 28, 1904, Congress again put all of these Arkansas statutes in force throughout Indian Territory, among which was said Chapter 49, and made these statutes applicable to all persons and estates then in Indian Territory, whether Indian, freedmen or otherwise. It is our contention, as set forth in the *Washington-Miller* case, that this last Act of Congress repealed all other prior acts inconsistent therewith and therefore repealed these provisos so found in said Section 6 in said Creek Supplement; and this view seemed to be now held and entertained by the Supreme Court of the State of Oklahoma, as shown by its decisions cited by us in our brief in that case, and in the decision of *Labadie et al.* v. *Smith,* since decided on the 17th of April, 1914, and reported in 41 Okla. 773, and 140 Pac. 427. So that

at the time Lowiney Harjo died on the 12th day of July, 1905, we respectfully submit that Chapter 49 of Arkansas then existed in Indian Territory with the same force and effect and subject to the prior construction and interpretation thereof, given to it by the Supreme Court of the State of Arkansas prior to its adoption by Congress for Indian Territory under the various acts aforementioned.

The pioneer case in the construction of said Chapter 49 is that of *Kelly's Heirs* v. *McGuire and Wife*, 15 Ark. 555, which was rendered about the year 1854. By this decision this whole statute was construed and the distinction or difference between an ancestral estate and a new acquisition, as therein made and provided, was distinctly pointed out and the respective heirs to each estate was thereby defined; and that decision has ever thereafter been readily adhered to by the Supreme Court of Arkansas, as may be seen in the following decisions: *Loftis* v. *Gass*, 15 Ark. 680; *Seull* v. *Vaughne*, 15 Ark. 695; *Galloway* v. *Robinson*, 19 Ark. 396; *Bird* v. *Lipscomb*, 20 Ark. 19; *Moss* v. *Ashbrook*, 20 Ark. 128; *Campbell* v. *Ware*, 27 Ark. 65; *Beard* v. *Mosely*, 30 Ark. 519; *Magness* v. *Arnold*, 31 Ark. 103; *Boseman* v. *Browning*, 31 Ark. 376; *Oliver* v. *Vance*, 34 Ark. 564, and *Kountz* v. *Davis*, 34 Ark. 596, and *Hogan* v. *Findley*, 52 Ark. 55, referred to in our brief in the *Washington-Miller* case on page 80 and thereafter where the same are set out and considered at considerable length.

So that for a period of more than fifty years prior to the time when Chapter 49 was put in force in the Creek Nation under the above named Acts of Congress, the decision in this *Kelly-McGuire* case thus construing that section had become a rule of property in the State of Arkansas, and was still a rule of property at the time this chapter was so adopted and thus spread over the Indian Territory and thus made applicable to all persons and estates then inhabiting that country. By a line of decisions of this court cited in our brief in the *Washington-Miller* case the construction and interpretation of this chapter rendered by the Supreme Court of Arkansas prior to its adoption, was made part of the chapter itself as much so as the text and was equally binding upon the courts; and this principle was openly recognized and followed by the Eighth Circuit Court of Appeals itself, prior to this *Shulthis* decision in the cases of *Sanger* v. *Flow*, 48 Fed. 152; *Apollo et al.* v. *Brady et al.*, 49 Fed. 401; *Rainwater-Boogher Hat Co.* v. *Malcolm*, 51 Fed. 734, and *Blaylock* v. *Incorporated Town of Muskogee*, (July 28, 1902) 117 Fed. 125; and the same principles recognized and held by this court, as shown in said brief and specially in the case of *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 307, 42 L. ed. 752; *Evans-Snider-Buell Co.* v. *McFadden*, 105 Fed. 293; 185 U. S. 505, 46 L. ed. 1012; *Robinson & Co.* v. *Belt*, 47 L. ed. 65; and *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U. S. 492, 45 L. ed. 1200, in which last case it was held:

> "Federal statutes must be interpreted by the federal courts independently of local conditions, and cannot be said to have an established meaning, whatever the decisions of other courts may have been, *until they are construed by the Supreme Court of the United States.* (Italics are ours.) And in dealing with such statutes, we must apply the rules and decisions of that court and other courts which are bound by its decisions, in arriving at the meaning of the same."

And in this respect, we would also call this court's attention to the fact that the United States Circuit Court for the Eastern District of Oklahoma followed and adhered to these same principles and former constructions of this Chapter 49 in rendering its opinion and decision in this same *Shulthis* v. *McDougal* case as reported in 162 Fed. 331. So we find this decision of the Circuit Court of Appeals in that case standing alone, and refusing to follow all these former decisions and principles governing such matters. Now, by the decision of the Supreme Court of Oklahoma in the case at bar, we find it standing by that decision of the Circuit Court of Appeals simply as a rule of property, and has the beginning of its existence with that decision alone, but is contrary to the rule of property which arose under the *Kelly-McGuire* case and other prior decisions of the Supreme Court of Arkansas more than fifty years before the *Shulthis* decision was ever rendered, and have applied that rule in the case at bar where the rights of these heirs vested

in the lands in controversy nearly four years prior to the rendition of the *Shulthis* decision. In other words, when Lowiney Harjo died on the 12th day of July, 1905, the plaintiffs in error as her brothers and sister took the fee simple title to her allotment, subject to a life estate therein in succession to her father and mother, under Chapter 49 of Arkansas as it then existed in Indian Territory, and as it had been construed for more than fifty years prior to that time and steadily adhered to, not only by the Supreme Court of the State of Arkansas, but various other courts, as specifically pointed out in our brief in the *Washington-Miller* case and decisions therein cited. Then, nearly four years after the right, title and interest of the plaintiffs in error had vested in fee simple in this allotment, a new and entirely different decision is handed down by the Circuit Court of Appeals, the very reverse of anything ever theretofore held respecting said Chapter 49 or rights arising thereunder, and that decision is then applied by the state Supreme Court to the case at bar and made to divest vested rights of the plaintiffs in error in said allotment under said former decisions. And that, too, is put upon a rule of property, which thus had its origin nearly four years after the plaintiffs in error had thus acquired their vested rights in this allotment under the law as it existed at the time of the death of Lowiney Harjo on the 12th day of July, 1905. Had the state Supreme Court based its decision in the case at bar

on the ground that this decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal* was correct in law and based upon sound legal principles, and therefore had in fact always been the law under Chapter 49 of Arkansas, or at least ever after the same had been so adopted by Congress, then its decision would have been to some degree at least tenable, as in that case the force and effect would have extended back to the time when these acts were thus adopted and thereby covered the time of the death of Lowiney Harjo, and if correct, on sound principles of law the same would have prohibited the plaintiffs in error from thus inheriting the fee to said allotment. But, this is not the basis of the decision of said Supreme Court of the State of Oklahoma; but it is predicated solely on the ground that this *Shulthis* decision has become a rule of property, which of itself admits that the decision itself does not rest upon sound legal principles or a correct construction of said Chapter 49. Otherwise, there would be no necessity of standing by it as a rule of property; but it would stand alone and rest upon its own inherent qualities and legal principles.

The case at bar is the first case in which the Supreme Court of Oklahoma has judicially declared that this *Shulthis* decision was a rule of property. As before stated, it was rendered on the 23rd day of April, 1913. This is nearly eight years after the plaintiffs in error had acquired their rights in the lands in controversy. Yet, by this decision, the

plaintiffs in error are expressly held by said Supreme Court to have no right, title or interest in the lands in controversy, the title to which arose in such heirs on the 12th day of July, 1905. Of course, such results cannot be brought about in this manner. These decisions of the Supreme Court of Oklahoma respecting this *Shulthis* decision and now brought before this court for review, amount almost to affirmative decisions of that court to the effect that, in the judgment of that court, this decision of the Circuit Court of Appeals is entirely erroneous and is not a correct construction of the law governing these matters; for, as before stated, it stands by that decision on the ground only that it has become a rule of property in Eastern Oklahoma, and that, too, by less than a full bench, in the case at bar. Of course, when Congress adopted these statutes of Arkansas and spread them over Indian Territory, they thereby became Acts of Congress; and their final construction and the legal force and effect of their adoption and their application to the persons and estates of said territory are cognizable in this court as the court of last resort in such matters. The jurisdiction of this court in this *Shulthis* case was defeated simply for want of the allegation of jurisdictional facts in the pleadings in that cause, which also resulted in making final this decision of the Circuit Court of Appeals in that particular case. We, therefore, respectfully submit that that decision not being that of a court of last resort in the

construction of Chapter 49 or of property rights arising thereunder, could not, and did not, operate as a rule of property, binding upon the Supreme Court of the State of Oklahoma; and therefore, its decision in the case at bar, resting on that alone, is without any foundation whatever. 26 Am. and Eng. Ency. of Law, 163, and 173, and cases cited.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR.

**That said court also erred in holding that "John Pigeon and Mate Pigeon, his wife, are the persons to whom on the death of the allottee (Lowiney Harjo), this estate passed in equal moieties and that plaintiffs in error, plaintiffs below, have no interest therein"; and that "for that reason the (said District) court did not err in sustaining the demurrer to their petition".**

**That said court erred in holding that, upon the death of said Lowiney Harjo, the plaintiffs in error took no right, title, interest or estate in or to said lands in controversy; but that said lands and all right, title and interest therein passed to said John Pigeon and Mate Pigeon in equal moieties, to the entire exclusion of said plaintiffs in error; and for said reasons, affirming the said judgment and decree of said District court.**

Plaintiffs in error further say that said judgment and decision of said Supreme Court of the State of Oklahoma aforesaid is repugnant to and

in conflict with the 14th Amendment to the Constitution of the United States and with two Acts of Congress, one entitled, "An act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians, and for other purposes," and especially section 6 thereof which reads as follows:

> "The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided,* That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And *provided further,* That if there be no persons of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said Chapter 49;"

and said other act is entitled, "An act to provide additional United States Judges in the Indian Territory, and for other purposes," and especially Section 2 thereof which reads as follows:

> "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operations, so as to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the District Courts in said ter-

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ritory in settlements of all estates of decedents, the guardianship of minors and incompetents, whether Indians, freedmen, or otherwise" (passed on the 28th of April, 1904).

Plaintiffs in error further state that said Supreme Court of said State of Oklahoma is the highest court of said state in which a decision in this suit could be made; that the right, title and interest of the plaintiffs in error, in and to said lands in controversy in this suit, were derived from, and arose out of, said Acts of Congress mentioned in this proceeding, and especially said last two acts above named and the said sections herein set forth, and said Chapter 49 of Arkansas put in force in said Indian Territory under, and as provided in, said Acts of Congress; that, in said suit and proceedings thereof as shown by the record, proceedings and papers in the case, and the decision of said Supreme Court of said state, the plaintiffs in error specially set up and claimed said lands under and by reason of said Acts of Congress; and that, by its decision rendered in this suit, said Supreme Court denied to the plaintiffs in error all right, title, interest and estate in and to said lands, and decreed the same to said John Pigeon and Mate Pigeon, and thereby indirectly, to said defendant in error, William Buck, under and by reason of said deeds so made to him by said John and Mate Pigeon, in fee simple forever. And to which said judgment and decision of said Supreme Court, plaintiffs in error except,

and assign the same as error on the grounds above given.

What we have previously said in this brief under prior assignments applies equally to the fourth assignment of error, and the first part of the fifth assignment; for if said allotment in the hands of said Lowiney Harjo was a new acquisition as defined in said Chapter 49 of Arkansas; and if said chapter and its prior constructions by the Supreme Court of Arkansas were to be taken, held and construed by the courts subsequently to their allotment the same as before such adoption by Congress, then it follows as a matter of course that said John Pigeon and Mate Pigeon did not inherit said allotment in equal parts in fee simple, but took only life estates therein with the fee simple title thereto vested in the plaintiffs in error. And, we respectfully submit, that after said statutes had been so adopted by Congress, and especially after they had in legal effect been continued and re-adopted by Congress on the 28th day of April, 1904, by said act approved on said date, that said courts were bound by the prior construction of said Chapter 49 by said Supreme Court of Arkansas, by which decisions and constructions, the full legal meaning, interpretation and construction of said chapter had become firmly fixed and judicially settled before their adoption and thereby the same had become rules of property and were binding not only upon all persons affected thereby, but likewise upon all courts called

upon to enforce such laws and to protect such rights of such persons.

That the decision in the case at bar and this *Shulthis* decision on which it is based as a rule of property, are not in accordance with these prior decisions of the Supreme Court of Arkansas construing said chapter, is beyond dispute; and, we respectfully submit that the same are not in accordance with the common law, as defined and extended over Indian Territory by said Act of Congress and embraced in Chapter 20 of said Statutes of Arkansas.

In 4th Kent's Commentaries (11th ed.), page 395, the author observes:

> "The admission of the father to the inheritance of his children dying intestate, and without lineal descendants, is an innovation, and a very great improvement upon the English common-law doctrine of descent. The total exclusion of parents, and all lineal ancestors, in such a case, is said to be peculiar to the English law, and to the laws of other nations, which have been deduced from the feudal policy."

In Blackstone, book 2, page 212, the author observes:

> "If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feudal tenures. For it was an express rule of the

feudal law, *(x)* that *succession is feudi talis est natura, quod ascendentes non succedunt;* and therefore the same maxim obtains also in the French law to this day. *(y)* (4) Our Henry the First, indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line; *(x)* but this soon fell again into disuse; for as early as Glanvil's time, who wrote under Henry the Second, we find it laid down as established law, *(a)* that *haereditas nunquam ascendit;* which has remained an invariable maxim ever since. These circumstances evidently show this rule to be of feudal origin; and taken in that light, there are some arguments in its favour, besides those which are drawn merely from the reason of the thing. For if the feud of which the son died seized, was really *feudum antiquum,* or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were *feudum maternum,* or one descended from his mother, and then for other reasons (which will appear hereafter) the father could in no wise inherit it. And if it were *feudum novum,* or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by known maxim or the early feudal constitutions; *(b)* which was founded as well upon the personal merit of the vassal, which might be transmitted to his children but could not ascend to his progenitors, as also upon this consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal services. Nay, even

if this *feudum novum* were held by the son *ut feudum antiquum*, or with all the qualities annexed to a feud descended from the ancestors, which feud must in all respects have descended as if it had really been an ancient feud; and therefore could not go to the father, because if it had been an ancient feud, the father must have been dead before it could have come to the son. Thus whether the feud was strictly *novum*, or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases the father could possibly succeed. These reasons, drawn from the history of the rule itself, seem to be more satisfactory than that quaint one of Bracton. *(c)* adopted by Sir Edward Coke *(d)* which regulates the descent of lands according to the laws of gravitation."

Generally the construction put upon a state statute of descents by the highest court of that state is binding upon the federal courts; and this extends to right of an alien to inherit, or that first cousins take the estate to the exclusion of second cousins, etc. *Hanrick* v. *Patrick*, 119 U. S. 156, 30 L. ed. 396; *Middleton* v. *McGrew*, 23 How. 45, 16 L. ed 403; *Byers* v. *McAuley*, 149 U. S. 608, 621, 37 L. ed 867; *Levy* v. *McCartee*, 6 Pet. 102, 109, 8 L. ed. 334; *Gardner* v. *Collins*, 2 Pet. 58, 7 L. ed. 347.

Matters of descent are extensively considered by this court in these decisions; and in the case of *Gardner* v. *Collins et al.* there is a full discussion of the laws of descent of the State of Rhode Island, which, in some respects, were very similar to Chap-

ter 49 of Arkansas, and one provision of which is as follows:

> "When the title to any real estate of inheritance as to which the person having such title shall die intestate came by descent, gift or devise, from the parent or other kindred of the intestate, and such intestate die without children, such estate shall go to the kin next to the intestate of the blood of the person from whom such estate came or descended, if any there be."

As to the common law, in the consideration of this case, this court observed:

> "At the common law a man might sometimes inherit who was of the whole blood of the intestate, who could not have inherited from the first purchaser. As in the case of a purchase by a son who dies without issue, and his uncle inherits the same, and dies without issue, the father may inherit the same from the uncle, although he could not inherit from his own son."

The same result would arise under Section 2531 of Chapter 49 of Arkansas, where if a son should die, intestate, without issue and without brothers and sisters, leaving him surviving his father and an uncle, who was the brother of the father, seized of a new acquisition, as therein provided, this uncle would inherit the fee subject to a life estate in the father; and on the death of the uncle, intestate, and without issue or descendants, and leaving the uncle as his heir at law, the father in that case would in-

herit the fee from his brother and not from his own son.

So that, it will be observed that the decision in the case at bar and likewise that in *Shulthis* v. *McDougal* are not sustained either by the common law or Chapter 49 of Arkansas—not even Section 2534 of said chapter, which provides:

> "In all cases not provided for by this act, the inheritance shall descend according to the course of common law."

In *National Live Stock Commission Co.* v. *Talliferro et al.*, 20 Okla. 177, the same Supreme Court held:

> "It will be presumed that Congress, in adopting the Statutes of Arkansas for the Indian Territory, adopted them with the construction and interpretation that had been placed on them by the Supreme Court of Arkansas prior to their adoption by Congress" (citing as authority *Sanger* v. *Flow*, 48 Fed. 152; *Apollos* v. *Brady et al.*, 49 Fed. 401; *Henriette Mining & Milling Co.* v. *Gardner*, 175 U. S. 123, and *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295).

To the same effect is *Sango* v. *Flow et al.*, 48 Fed. 152; *Appollos* v. *Brady*, 49 Fed. 401; *Rainwater-Boogher Hat Co.* v. *Malcolm*, 51 Fed. 730, and *Blalock* v. *Muskogee*, 117 Fed. 125, all of the Circuit Court of Appeals; and *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295, 42 L. ed. 752, point 3, where this court held:

"Where an Act of Congress has been taken from a state statue the known and settled construction which such statute has received in the state before the original enactment of the Act of Congress, must be considered as having been adopted by Congress with the text thus expounded."

And in *Robinson & Co.* v. *Belt,* 187 U. S. 41, 47 L. ed. 65, this court again held:

"*2.* The courts of the Indian Territory are bound to respect the decisions of the Supreme Court of Arkansas interpreting laws of that state which were adopted and extended over the Indian Territory by the Act of Congress of May 2, 1890.

*3.* An assignment for the benefit of creditors although requiring a release by creditors as a condition of preference, must be deemed valid in the Indian Territory, in view of the decisions of the courts of Arkansas upholding such assignments under the statutes of that state concerning assignments for the benefit of creditors and the statute of frauds, which were adopted and extended over the Indian Territory by the Act of Congress of May 2, 1890 (26 Stat. L. 94, Sec. 31)."

By this line of decisions and numerous others of the same character presented in our brief in *Washington* v. *Miller,* it is firmly established that passing upon the legal force and effect of these Statutes of Arkansas after they were so adopted for Indian Territory, these former constructions must be taken, as, and part of, the text of the statutes themselves, and especially is that true of Chap-

ter 49; and we respectfully submit that it was not competent for these courts subsequently to such adoption to undertake to lay down different rules or decisions from those of prior existence respecting these statutes. To do so we respectfully submit is simply the creation of rules of property which never had any prior existence but are expressly contrary to such prior rules, and cannot be upheld by the principles of law sustained by these decisions. After these statutes were adopted by Congress they thereby became Acts of Congress; and it was not competent for the Supreme Court of Oklahoma to undertake to hand down a decision in the case at bar and as a rule of property, not only contrary to, but the very reverse of, all prior construction of said chapter by the Supreme Court of Arkansas and all other courts and decisions except this *Shulthis* decision, which, we respectfully submit, is erroneous for the same reasons and for others more extensively given in our brief in the *Washington-Miller* case.

The rights of these parties arise out of, and are protected by, these Creek treaties and this Act of Congress approved on the 28th of April, 1904.

In *Labadie et al.* v. *Smith*, 41 Okla. 773, the Supreme Court of Oklahoma held:

> "*Indians — Descent and Distribution — What Law Governs.* Under the Act of April 28, 1904, c. 1834, 33 St. 573, the Arkansas law of descent and distribution of decedents' estates, as provided in Chapter 49, Mans. Dig.

(Secs. 2522-2545), was extended over and put in force as to the estates of all tribes of Indians and all other persons, freedmen or otherwise, in the Indian Territory. And the heirs of a deceased member of the Peoria tribe who died in 1906 inherited under the Arkansas law."

In support of that decision said Supreme Court cited and relied upon the opinion of the Assistant Attorney-General to the Department of Indian Affairs, and the following decisions of this court: *United States* v. *Moore*, 95 U. S. 763, 24 L. ed. 588; *United States* v. *Alabama R. R. Co.*, 142 U. S. 621, 35 L. ed. 1134; and *Mining Co.* v. *Gardner*, 173 U. S. 128, 43 L. ed. 637.

Therefore, according to this last decision of the Supreme Court of Oklahoma, the law of descent throughout Indian Territory as to all persons and estates therein ever after the 28th of April 1904, to statehood, was Chapter 49 of Arkansas, as the same existed in the State of Arkansas; and that all other acts inconsistent therewith were thereby repealed. Therefore, when Lowiney Harjo died on the 12th day of July, 1905, her estate passed by descent under said chapter, and in the same way and manner, and to the same persons to whom it would have descended or gone by descent had her allotment been situated in the State of Arkansas and been governed absolutely by these prior decisions of the Supreme Court of that state, especially *Magness* v. *Arnold*, 31 Ark. 103, and *Hogan* v. *Findley*, 52 Ark. 55, which involved lands of minors

which had been purchased by their parents for their benefit out of the domain of said state and the United States Government, and on their respective deaths, said lands were held by the Supreme Court of said state as new acquisitions and not as ancestral estates, and in which the parents were held to be entitled to only life estates with the fee simple title in the collateral kindred of said minors.

We therefore submit that the decision of the Supreme Court of Oklahoma in the case at bar, as well as said decision of *Shulthis* v. *McDougal*, are erroneous, and cannot be supported or maintained either by the common law of descent or by Chapter 49 of Arkansas, which existed in the Indian Territory on the death of said Lowiney Harjo; and that, therefore, the decision of said Supreme Court in this case should be reversed and that a decision herein should be rendered holding that said lands in the hands of said Lowiney Harjo were a new acquisition, and not ancestral; and that on her death the fee thereto descended to the plaintiffs in error subject to a life estate therein in succession first to the father, John Pigeon, then to the mother, Mate Pigeon.

Respectfully submitted,

LEWIS C. LAWSON,
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Holdenville, Oklahoma,
December 1, 1914.

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No. 199.

*In the*

# Supreme Court of the United States.

*October Term, 1914.*

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LENA PIGEON, JIMMIE LARNEY, JOSEPH PIGEON and JAKEMAN PIGEON, Minors, by JOHN PUSLEY, as Their Next Friend,
*Plaintiffs in Error,*

*vs.*

WILLIAM BUCK, WILLIE HARJO, JOHN PIGEON and MATE PIGEON, *Defendants in Error.*

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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## *Brief on Behalf of Defendants in Error.*

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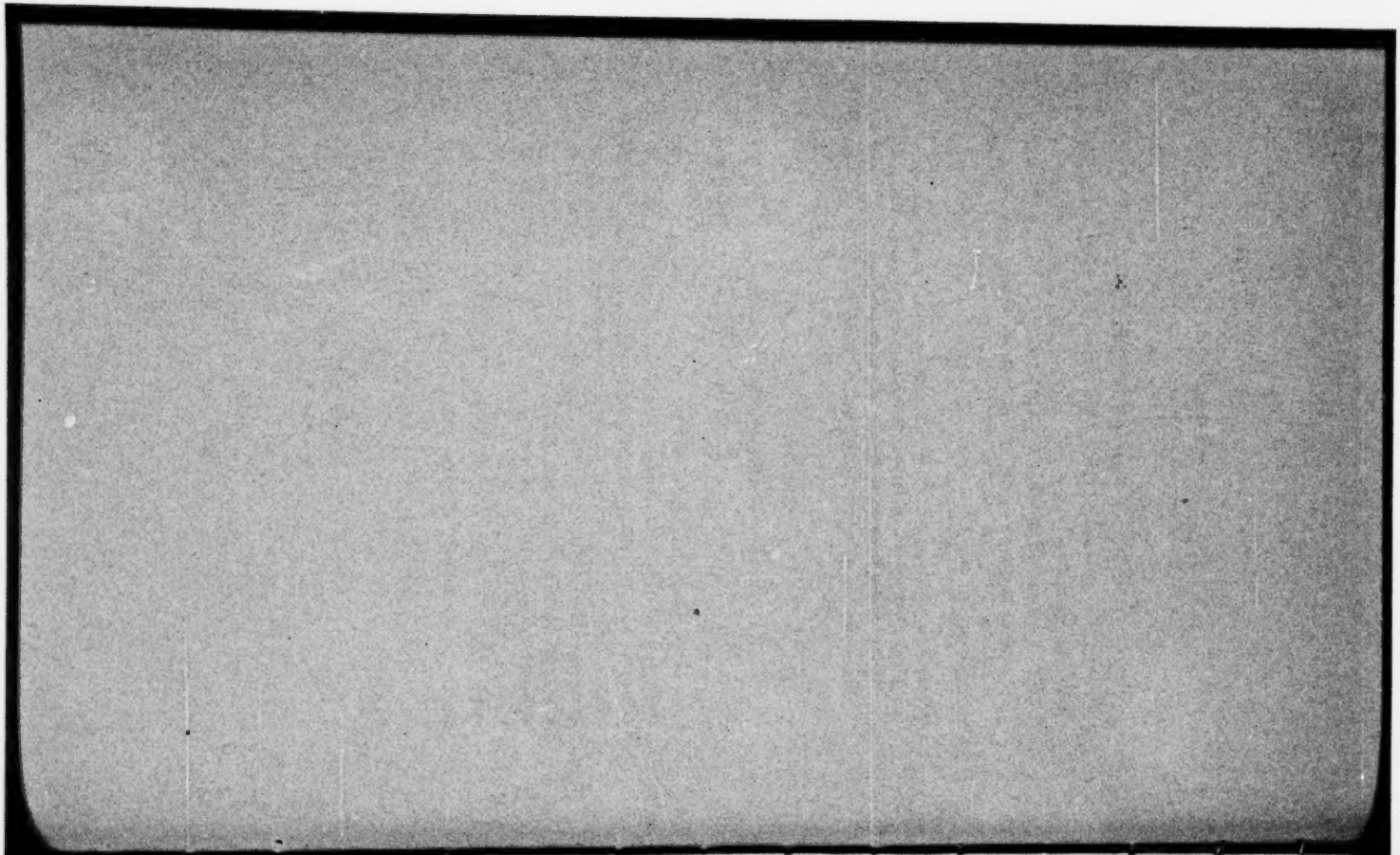

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## CASES CITED.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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# BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

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## Statement of the Case.

This case only involves 160 acres of poor farm land in Eastern Oklahoma. The question involved, however, is an important one to the home owners of Oklahoma. The land was allotted to Lowiney Harjo, a full-blood Creek Indian, who died in July, 1905, while the Arkansas law was in force in Indian Territory. The allottee died intestate and left the plain-

tiffs in error as her brothers and sister, and John Pigeon and Mate Pigeon, her father and mother, all being full-blood Creek Indians. John and Mate Pigeon sold the land involved in this action to William Buck, the conveyance having been approved by the County Court. Plaintiffs in error, the brothers and sister of the allottee, contend in this case that under the law in force at the date of the death of the allottee that they inherited the allotment of their sister Lowiney Harjo. Defendants in error contend that under the law they inherited the lands upon the death of their child, Lowiney Harjo. The real and only question then involved in this case is the construction of the Arkansas Law of Descent and Distribution as applied to conditions in Indian Territory.

Plaintiffs in error in their petition set out fully the facts upon which they rely to recover. (Rec., pp. 13, 14, 15 and 16.) A demurrer was interposed to the petition, which was, by the trial court, on the 28th day of June, 1911, sustained. Plaintiffs in error appealed to the Supreme Court of the State of Oklahoma, and at the spring term of said court, A. D. 1913, this cause was affirmed; from this judgment of the Supreme Court of the State of Oklahoma this case has been prosecuted by plaintiffs in error.

## BRIEF *and* ARGUMENT.

We concede at the outset that there is but one question involved in this case, to-wit: The construction of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas as applied to conditions in the Indian Territory. The first judicial utterance upon this question was by the Circuit Court of Appeals for the Eighth Circuit, in the case of *Shulthis* v. *McDougal*, 170 Fed. 529. The next was the case of *Pigeon* v. *Buck*, which is the case at bar, 38 Okla. 101. In the case of *McDougal* v. *McKay et al.*, 142 Pac. Rep. 987, the Supreme Court of the State of Oklahoma followed the case of *Pigeon* v. *Buck*, and *Shulthis* v. *McDougal*. No contrary opinion by any court upon this question can be cited by any one. The above decisions all held squarely that all estates of the kind involved in this action are to be classed as ancestral estates and not new acquisitions.

In the case of *Shulthis* v. *McDougal, supra*, which is more than five years old in this jurisdiction, the court's argument is the best argument that we can present upon this question:

> "AMIDON, District Judge. This is a suit in equity brought by appellant to determine conflicting rights to a parcel of real property situated in Oklahoma. While the cause was pending, George Franklin Berryhill was permitted to file a petition in intervention therein and make common cause with the complain-

ant. The decree below dismissed the bill upon the merits. The case can best be presented by unfolding the facts and the law together.

Andrew J. Berryhill was the son of George Franklin Berryhill, a member of the Creek Nation of the mixed-blood, and Clementine Berryhill, his wife, a non-citizen of that tribe. He was born on the 6th day of May, 1901, and died in the month of November of that year, leaving no brothers or sisters surviving him. At no time during his life was he entitled to enrollment as a member of the tribe, or to an allotment of its property. After his death, by the Supplemental Agreement entered into between the Commission of the Five Civilized Tribes, and the Commissioners of the Creek Nation (Act June 30, 1902, c. 1323, 32 Stat. 501), proclaimed by the President August 8, 1902, it was provided in section 7, as follows:

> 'All children born to those citizens who are entitled to enrollment under previous acts, subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission.'

Andrew J. Berryhill met precisely the conditions of this agreement. He died, however, before the agreement was entered into, as already stated. But the agreement further made express provision for such a contingency in section 7, as follows:

> 'And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands, and distributive share of the funds of the tribe, the lands and moneys to which he would

be entitled, if living, shall descend to his heirs as herein provided, and be allotted and distributed to them.'

The phrase 'as herein provided,' refers to chapter 49 of Mansfield's Digest of the Statutes of Arkansas, which deals with the subject of heirship and descent.

The word 'descend' is, of course, inapplicable to the actual contingency provided for by the statute, because that contingency contemplated the death of the child before he had actually become seized of any interest in the land. The word 'descend' is a word of art, and indicates the transference of property by inheritance. If any significance is to be given to it as used in this section, it must be held that the intent of the parties to the agreement was that the land should pass to the same persons and in the same proportions as it would have passed if the child had died seized of it. Any other construction simply obliterates this word, and makes the land pass to the parties who are heirs directly by allotment from the tribe. The statute itself not only declares that it shall 'descend,' but also declares that it shall be 'allotted and distributed,' to the heirs. It is manifest, therefore, that both ideas were in the minds of the parties to the agreement.

This construction receives further support by the general scheme which the federal government and the Creek Nation formed for the disposition of the tribal property. The first requisite for the partition of the tribal estate in severalty among its members was to ascertain and legally establish who were members of the tribe. By reason of the many intermarriages

between members of the tribe and members of the white and negro races, and by reason of the fraudulent claims to membership, the ascertainment of the particular persons who were in fact entitled to such membership proved a much more difficult task than was at first anticipated. The Commission was empowered and directed to prepare such a roll. This work not only required much investigation on its part, but resulted in voluminous litigation. Instead of being a work of months, it proved to be a work of years. In the meantime, however, the membership of the tribe was constantly undergoing change by birth and death. In order to provide for all members of the tribe who were born subsequent to the beginning of the enrollment, the date of right to enrollment was twice set forward, the statute last quoted fixing the latest date. By reason of these facts, when the roll was completed, it contained more names than were members in being. The roll, however, furnished the basis for the division of the tribal estate. Every person whose name was entered on the roll was entitled to an equal proportion of the tribal land and funds; but by reason of the fact that before actual distribution could be made, and even while the enrollment was in progress some persons whose names were on the roll would die, the statute made provision for the disposition of the share of tribal property which would go to them if living. Such a provision was necessary. Otherwise there would have been a portion of the tribal property undistributed. It was never the intent, however, either of the tribe or the federal government, to grant to parties having a kinsman who had died before the actual making of the allotment

additional lands as a bounty. These kinsmen got all their right to additional lands under and through the enrolled member who had died. Whether the ancestor was actually seized of the property or not in his lifetime, was immaterial. It was the intent of the statute that the property should pass by the same right and in the same manner that it would have passed if the person enrolled had survived to receive his allotment. The tribe was not bestowing such land as a bounty, but was simply providing for the right of inheritance.

Congress itself has construed this statute. Section 5 of the act (Act April 26, 1906, c. 1876, 34 Stat. 138) provides:

> 'That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued, shall issue in the name of the allottee; and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein, shall inure to and vest in his heirs; and in case any allottee shall die after the restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life; and all patents heretofore issued where the allottee died before the same became effective, shall be given like effect.'

Here is an express declaration by Congress that the land shall descend to heirs the same as it would have descended if the patent or deed had issued to the allottee during his life, and it is declared that allotments for allottees who have died shall also thus descend. This in-

terpretation by Congress of its own act leaves no room for doubt as to its intent.

We must, therefore, look to chapter 49 of the Arkansas statute both to ascertain who the heirs are, and what estate they shall take in the property. That statute does not treat the subject of heirship independently, but combines that subject with the estate to pass by inheritance. Sub-section 2 of section 2522 provides as to general estate, both personal and real, of a person dying intestate, and having no children, that it shall go to the father. This section, however, is to be read in connection with section 2531, which deals with the subject of the devolution of property when there is no heir of the blood to whom it can descend. Under this statute, if the deceased person came by the estate from his father, it is to go to the father, and if he came by it from his mother, it goes to the mother. The statute then proceeds:

> 'But if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate in the manner provided in this act.'

This statute makes provision for all possible acquisitions of real property for the civilized white community whose estates it was intended to govern. Among the people of Arkansas there was no way of acquiring land except by grant, gift or inheritance. This was true even of lands acquired from the federal government under the public land laws. The patentee of such lands was always required to purchase the same either by residence and improvement, or the payment of a purchase price,

or by these elements combined. It needs but a moment's thought to see that, when this statute was applied to the lands of the Creek Nation, it was applied to a subject-matter entirely different from that which was in the mind of the Legislature of Arkansas. The lands of that tribe fit into neither of the classes mentioned in the statute. They did not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase. In applying the statute in this case, therefore, we shall have to proceed by analogy only. The tribal lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the nation. They constituted the home or seat of the tribe. Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property. It was granted to the tribe by the federal government not only as the home of the tribe, but as a home for each of the members. From the time they took up their residence west of the Mississippi, the constitutions of the Five Nations provided that their land should remain 'common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them.' The term 'improvements,' as here used, meant not only betterments, but occupancy. *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 210, 15 Sup. Ct. 55, 39 L. ed. 120. These 'improvements' passed from father to son, and were the subject of sale, with the single restriction that they

should not be sold to the United States, individual states, or to individual citizens thereof. Under such regulation the members of the Creek Nation had been in possession of homes on their tribal lands for more than half a century. The portion of their lands which were not occupied in severalty, as well as the tribal funds, were treated as belonging to the members, and all income derived therefrom was distributed among them per capita. While the legal title to the tribal property belonged to the tribe as a political society, the beneficial use of the same had at all times belonged to the members in severalty. It was to such a condition of life and property as this that the plan of allotment here involved was to be applied. Its controlling principle is a clear recognition that each member of the tribe, by virtue of his membership, was entitled to an equal share in all the tribal property. To carry out the scheme, the law first proceeds on the one hand to ascertain the membership of the tribe, and on the other the actual present value of its property, and then directs that the tribal property be divided per capita so that each member shall receive an equal share thereof, according to its true value. The right to such a share is not created by the statutes, but is simply recognized and enforced by them. The several agreements and Acts of Congress are not concerned with the legal title, but go back to the actual beneficial rights of property as they had always existed in Indian Territory. They require allotments to be made so as to save to each member his improvements, including his right of occupancy. While the tribe in carrying out the project grants the legal title to the property, it does not confer the right to

that property. The act by which the distribution is made is spoken of not as a grant, but as an allotment. We are not departing from the well-established doctrine of the Supreme Court that the lands of these Indians belong to them as a political society and not to the individual members. *Cherokee Trust Funds,* 117 U. S. 288, 308, 6 Sup. Ct. 718, 29 L. ed. 880; *Delaware Indians* v. *Cherokee Indians,* 193 U. S. 127, 24 Sup. Ct. 342, 48 L. ed. 646. So long as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private, separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovreign owner. Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect to by that act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe. It was his birthright. It came to him by the blood of his tribal parent, and not by purchase. In applying the Arkansas statute, we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands not as a new acquisition by him, but as an inheritance from his parents, as members of the tribe. His father was the only parent through whom he derived his right, and to

the father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the parents equally. From this premise it necessarily follows that George Franklin Berryhill succeeded to the entire estate of the property in question.

We next pass to the rights of the parties to this controversy under the conveyances from George Franklin Berryhill. On June 5, 1906, he and his wife executed a warranty deed of the property to Edmund and Perry McKay in consideration of the sum of $2,000. It is now contended that this deed was void because at the time of its execution the grantor was without legal capacity to make such a conveyance. It is conceded that George Franklin Berryhill had only such power to dispose of the lands in question as was granted to him by the Act of Congress. Both parties base their right upon section 22 of the act approved April 26, 1906, which reads as follows:

> 'That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe * * * may sell and convey the lands inherited from such decedent.'

George Franklin Berryhill and appellant Shulthis make the same argument upon this statute that they did upon section 7, above quoted. It is urged that the land in question is not 'inherited' land. For reasons already explained, that contention, while technically right, is substantially wrong. The scheme of the statute clearly indicates that the land was to be

regarded the same as if it had been inherited. No sound reason can be adduced for treating these lands otherwise than they would have been treated if Andrew J. Berryhill had survived long enough to receive the allotment. This interpretation is further supported by the provision of the several acts dealing with these allotments. Every member of the tribe was allotted a share in the tribal lands. Such allotment is repeatedly spoken of in the act as his 'homestead.' To protect this homestead, it was made inalienable for the term of five years. The reasons for making it inalienable did not apply to lands obtained by inheritance, and for that reason the statute last quoted was passed granting power to convey the same. The lands here in question fall under the same policy as lands obtained by inheritance, and the statute should be held to apply thereto. Berryhill, therefore, had power to make the deed to the McKays."

(The remainder of the opinion pertains to other matters and is omitted.)

In the case of *Pigeon* v. *Buck*, the Supreme Court of Oklahoma implicitly followed the holding in the case of *Shulthis* v. *McDougal*, and the following is the full and complete opinion of the Supreme Court of Oklahoma in the case at bar:

"TURNER, J. On September 13, 1910, plaintiffs in error, Lena Pigeon, Jimmie Larney, Joseph Pigeon and Jakeman Pigeon, the two last named minors, by John Pusley, their guardian, sued in the District Court of Hughes County, the defendants in error, William Buck, Willis Harjo, John Pigeon and Mate Pigeon, to clear their title.

The petition substantially states that Lowiney Harjo, a full-blood citizen of the Creek Nation and duly enrolled as such, on July 12, 1905, after receiving her certificate and patents thereto, died intestate, seized of her allotment (describing it) in the Creek Nation; that she left no child or children or their descendants her surviving, leaving her surviving plaintiffs, Lena Pigeon, Jimmie Larney, Joseph Pigeon and Jakeman Pigeon and Mate Pigeon, also her husband, Willie Harjo, a full-blood citizen of the Creek Nation and duly enrolled as such; that thereafter the father and mother and the husband of deceased conveyed said land by warranty deed to the defendant, William Buck, which was duly approved by the County Court of Hughes County and filed for record; that the plaintiffs, brothers and sister of deceased, are her sole heirs, and as such entitled to inherit the property, because they say the same was a new acquisition; and prayed that the court so adjudge and decree and clear their title of the deeds made by the father and mother to said Buck. To the judgment of the court sustaining a demurrer to their petition, plaintiffs bring the case here.

Both sides agree that the devolution of this allotment is governed by chapter 49 of Mansfield's Digest of the Statute of Arkansas, and particularly sub-section 2 of section 2522, construed in connection with section 2531. Said sub-section reads: 'If there be no children then to the father, then to the mother; if no mother, then to the brothers and sisters or their descendants, in equal parts.'

And section 2531: 'In cases where the intestate shall die without descendants, if the es-

tate comes by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided.'

That the land in question was not a new acquisition, and pursuant to these sections, when construed together passed to John Pigeon and Mate Pigeon, the father and mother of the deceased, is no longer an open question in this jurisdiction, having in effect been decided by the Circuit Court of Appeals for the Eighth Circuit in *Shulthis* v. *McDougal*, 170 Fed. 529, 95 C. C. A. 615. There Andrew J. Berryhill, son of George Franklin Berryhill, a member of the Creek Nation of mixed-blood, and Clementine Berryhill, his wife, a non-citizen of that tribe, died seized of an allotment. In determining who took the estate, the court construed these two sections together and held the person to be George Franklin Berryhill, the father of the deceased, and in passing said: ' * * * But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme, it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right

to the property antedates the allotment, and is simply given effect to by the act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership to the tribe. It was his birthright. It came to him by the blood of his tribal parent, and not by purchase. In applying the Arkansas statute, we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands, not as a new acquisition by him, but as an inheritance from his parents as members of the tribe. His father was the only parent through whom he derived his right, and to his father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the parents equally.'

Many titles to lands on the eastern side of this state have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property there. *(De Walt* v. *Cline et al.,* 128 Pac. 121; *MaHarry* v. *Eatman,* 29 Okla. 46, 116 Pac. 935; *Duff et al.* v. *Keaton et al.,* 33 Okla. 92, 124 Pac. 201). We hold that John Pigeon and Mate Pigeon, his wife, are the persons to whom, on the death of the allottee, his estate passed in equal moieties, and that plaintiffs in error, plaintiffs below, have no interest therein. For that reason the court did not err in sustaining the demurrer to their petition."

The Supreme Court of Oklahoma followed the *Pigeon* v. *Buck* and *Shulthis* v. *McDougal* cases in the following recent decisions:

*Iowa Land & Trust Co.* v. *Dawson,* No. 2770 (not yet officially reported);

*Gillum* v. *Anglin* (not yet officially reported);
*McDougal* v. *McKay et al.*, 142 Pac. 987.

The last cited case of *McDougal* v. *McKay et al.*, was decided August 25, 1914, and for the convenience of the court we set forth this decision in full, which is as follows:

"SYLLABUS.

*1.* Andrew Berryhill was a mixed-blood member of the Creek Tribe of Indians. He died while an infant, intestate, in November, 1901. Thereafter his name was duly placed upon the rolls prepared by the Commission to the Five Civilized Tribes, and approved by the Secretary of the Interior. The land involved and other lands were selected by an administrator and set apart to him as an allotment. Patent was duly issued, conveying the land to his heirs. He left surviving his father, who was a mixed-blood member of the Creek Tribe of Indians, and his mother, who was a non-citizen and not a member of any Indian tribe, together with several uncles and aunts, members of the Creek tribe. *Held:* That under Mansfield's Digest, Chap. 49, Sec. 2531, which was in force in the Indian Territory by virtue of an Act of Congress, that the land involved was not a new acquisition, but came to him by the blood of his tribal parent, to-wit: his father, in whom the fee simple title to said land passed. (Following *Shulthis* v. *McDougal*, 170 Fed. 529; *Pigeon et al.* v. *Buck et al.*, 38 Okla. 101.)

*2.* The plaintiff in error tendered certain testimony of lawyers, for the purpose of show-

ing that the rule laid down by the Circuit Court of Appeals in the case of *Shulthis* v. *McDougal*, 170 Fed. 529, and the case of *Pigeon et al.* v. *Buck et al.*, 38 Okla. 101, had not been followed generally by the profession and trial judges. Objection was made to the introduction of this testimony, upon the ground that it was incompetent and immaterial, which objection was by the court sustained. *Held:* That the court committed no prejudicial error in sustaining said objection. *Held, further,* that the rule announced in the case of *Pigeon et al.* v. *Buck et al., supra,* is adhered to and held to be a rule of property.

Error from the District Court of Tulsa County, L. M. Poe, trial judge.—Affirmed.

Rosser & Cochran, attorneys for plaintiff in error; Ramsey & Thomas, attorneys for defendants in error.

OPINION OF THE COURT.

By RIDDLE, J. The admitted facts in this case are, that Andrew J. Berryhill was a member by mixed blood of the Creek Tribe of Indians; that he died intestate, while an infant, in the month of November, 1901, leaving surviving him his father, George Franklin Berryhill, and his mother, Clementine Berryhill; that George Franklin Berryhill was a member, by mixed blood of the Creek Tribe of Indians, and legally enrolled; that his wife, mother of the deceased, Clementine Berryhill, was a non-citizen and not a member of any Tribe of Indians; that Andrew J. Berryhill left no brothers or sisters surviving him; that on the 8th day of October, 1902, his name was duly and legally placed upon the tribal rolls of the Creek Nation

as a member and citizen thereof by the Commission to the Five Civilized Tribes, and approved by the Secretary of the Interior; that in the year 1904, there was set apart and allotted in the name of the said Andrew J. Berryhill, deceased, the lands involved in this suit with other lands; that in October, 1905, patents were duly issued, conveying the title to said land to the heirs of the said Andrew J. Berryhill, deceased; that on the 5th day of June, 1909, George Franklin Berryhill and wife, Clementine Berryhill, father and mother of Andrew J. Berryhill, deceased, for a valuable consideration, executed and delivered to defendants, Edmond McKay and Perry McKay, a warranty deed, conveying all their title and interest in and to the lands involved herein; that thereafter the said Edmond and Perry McKay conveyed their undivided one-third interest in said lands to John V. McKay; that Andrew J. Berryhill left surviving him the following uncles and aunts: Martha Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, Mary Kiefer and Josie Morton; that subsequent to August 8, 1907, the plaintiff, D. A. McDougal, received a conveyance from each and all of said uncles and aunts named herein, conveying to him whatever interest they each had, if any, in and to said land; that the defendant, Albert W. Shulthis, is in possession of said land under a lease contract made by the defendants, McKays, conveying to him the oil and mineral; and that he is operating and taking the oil from said land under said lease contract.

The plaintiff filed this suit in the District Court of Tulsa County to recover the lands in question, claiming to be the owner of the fee

simple title, by virtue of his several conveyances received from the uncles and aunts of Andrew J. Berryhill, deceased, and for an accounting for the value of the oil and gas taken therefrom; for the appointment of a receiver and to have his title to the lands quieted, subject to the life estate alleged to be owned by the McKays.

The principal question raised in this appeal is as to whether the title to the lands involved is an ancestral estate, or a new acquisition. The plaintiff contends that under the laws of Arkansas, which were in force in the Indian Territory and made applicable to the Creek Nation by virtue of an Act of Congress, the lands involved were a new acquisition, and hence the father of Andrew J. Berryhill, deceased, took only a life estate. On the other hand, the defendants contend that under the decision by the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Shulthis* v. *McDougal,* 170 Fed. 529, and upon the authority of the decision of this court in *Pigeon* v. *Buck*, 38 Okla. 101, the title to the lands of a Creek citizen who died intestate, unmarried and without issue, descended in fee simple to the parent or parents who were of the tribal blood of the intestate, and that in the present instance the lands involved and which were a part of the allotment of Andrew J. Berryhill, deceased, passed to his father.

This court in the case of *Pigeon et al.* v. *Buck et al., supra,* following the rule laid down by the Circuit Court of Appeals, said:

> 'That the land in question was not a new acquisition, and pursuant to these sec-

> tions, when construed together, passed to John Pigeon and Mate Pigeon, the father and mother of the deceased, is no longer an open question in this jurisdiction, having in effect been decided by the Circuit Court of Appeals for the Eighth Circuit in *Shulthis* v. *McDougal,* 170 Fed. 529, 95 C. C. A. 615. There Andrew J. Berryhill, son of George Franklin Berryhill, a member of the Creek Nation of mixed-blood, and Clementine Berryhill, his wife, a non-citizen of that tribe, died seized of an allotment. In determining who took the estate, the court construed these two sections together and held the person to be George Franklin Berryhill, the father of the deceased.'

And, in concluding the opinion, the court further said:

> 'We hold that John Pigeon and Mate Pigeon, his wife, are the persons to whom, on the death of the allottee, this estate passed in equal moieties, and that plaintiffs in error, plaintiffs below, have no interest therein.'

It cannot be questioned that the decision of the federal court construing the Act of Congress relating to the allotment, alienation, etc., of lands belonging to the members of the Five Civilized Tribes are conclusive upon the state courts. The decision of the Circuit Court of Appeals in the case of *Shulthis* v. *McDougal, supra,* in the absence of an expression from the Supreme Court of the United States, should be followed by this court on all questions involving the construction of the federal statutes and allotment acts relating to the members of the

Five Civilized Tribes. The question raised here by this appeal was directly involved in the case of *Shulthis* v. *McDougal, supra,* and directly adjudicated by the Circuit Court of Appeals, and that decision has been adhered to by this court in the case of *Pigeon et al.* v. *Buck et al., supra;* and whatever may be our individual views as to the soundness of these decisions, we are not at liberty to disregard them, but feel constrained to follow the rule laid down therein.

It is further contended by plaintiff that the trial court erred in excluding certain testimony of lawyers, tending to show that the rule laid down in the case of *Shulthis* v. *McDougal, supra,* was not followed, either by the legal profession or generally by the trial courts. The purpose of tendering this evidence was to show that the rule announced by the Circuit Court of Appeals in the case of *Shulthis* v. *McDougal, supra,* had not become a rule of property in this state. Objection was made to the introduction of this evidence, upon the ground that it was incompetent and immaterial; which objection was by the court sustained. We are now called upon to hold that this ruling of the court was error. Generally a question of this nature is one of law for the court, and not of fact; and the courts will usually take judicial knowledge as to whether or not a rule announced by the court is of such character, general standing and application as to become a rule of property. The decision in the case of *Shulthis* v. *McDougal* was rendered by the Circuit Court of Appeals in 1909 and became final and has been in force in this jurisdiction for several years; and about a year before the present case was tried, this

court had followed the rule laid down by the Circuit Court of Appeals in the case referred to, and held that the rule announced had become a rule of property. Owing to the fact that the decision of the Circuit Court of Appeals, in the absence of a final decision by the Supreme Court of the United States, is controlling in this state, when applied to the allotment and alienation of lands of the Five Civilized Tribes, and the further fact that this court in an opinion which has been in force over a year has followed the rule laid down by the Circuit Court of Appeals, and has held the same to be a rule of property, we are of the opinion that the court committed no error in excluding this evidence.

Discussing this question, Vol. 11, p. 755, Cyc states the rule to be:

> 'Where judicial decisions may fairly be presumed to have entered into the business transactions of a country and have been acted upon as a rule of contracts, and property, it is the duty of the court, on the principle of *stare decisis* to adhere to such decisions without regard to how it might be inclined to decide if the question were new. And this rule obtains, although the court may be of the belief that such decisions are founded upon an erroneous principle and are not sound, for when parties have acted upon such decisions as settled by law and rights have been vested thereunder, their inherent correctness or incorrectness in the abstract are of less importance than that the rule of property so established should be constant and invariable.'

Mr. Justice GREER, speaking for the Supreme Court of the United States, in the case of *Minnesota Company* v. *National Company*, 3 Wall. 332; stated:

> 'Where questions arise which affect titles to land, it is of great importance to the public that when they are once decided, they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of the law when the administrators of it is changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well-considered and solemn judgments.'

The basis upon which the rule rests is not so much the actual condition existing as a matter of fact, but when a decision of the highest court in any jurisdiction has settled a question of this nature which may affect title to property, it is conclusively presumed that parties have relied upon such decision as being the law when purchasing and selling property. While we are

aware of the fact that a large per cent of the lawyers in the eastern side of this state were of the opinion that the titles to land similar to the title in question were a new acquisition, yet it may be conceded that the statute was subject to the construction placed thereon by the Circuit Court of Appeals, and that no great principle of law was disregarded in establishing the rule laid down by that court. While prior to the decision of this court in *Pigeon et al.* v. *Buck et al., supra,* following the rule laid down by the Circuit Court of Appeals, the lawyers and the courts generally may not have followed the decision of the Circuit Court of Appeals implicitly, yet if only a very small per cent of the people investing money in lands of this character did so upon the strength of the rule announced by that court and as followed by this court, their title should not be disturbed by a decision at this time holding that the land in question was a new acquisition. Such decision might disturb vested rights and bring into question many titles, which should be avoided, if possible.

We are therefore of the opinion that the court did not err in rejecting the evidence offered, and we still adhere to the rule laid down by this court in the case of *Pigeon et al.* v. *Buck et al., supra,* following the decision of the Circuit Court of Appeals, *and we reiterate that the same has become a rule of property in this jurisdiction.*

Finding no prejudicial error in the proceedings and judgment of the trial court, the same is affirmed.

All the justices concur."

**The *Shulthis-McDougal* Case a Rule of Property.**

From the above and foregoing cases this court can easily observe that unquestionably the decision in the *Shulthis-McDougal* case decided in 1909, has become a rule of property in this jurisdiction. The record in this case shows that the county judge who approved the conveyance from John Pigeon and Mate Pigeon, father and mother of the allottee, followed this decision when he approved the conveyance to the defendant in error, William Buck. The District Judge in sustaining the demurrer followed this same decision. We know of no court high or low in this jurisdiction but that has followed the rule established in the case of *Shulthis* v. *McDougal, supra.*

This young giant, Oklahoma, is a new state and one of the last to be formed in the American Union. Until very recently it was a well known fact throughout the Union that all land in what was formerly Indian Territory was restricted and belonged exclusively to the Indians and was inalienable. A very small portion of our Indian population, who happen to be mixed-bloods, could alienate their land prior to the Act of Congress of May 27, 1908. This last mentioned Act of Congress, provided in substance, that full-blood Indian heirs might sell inherited lands subject to the approval of the County Court having jurisdiction of the settlement of the estate of such deceased Indians. Up until the passage of this act there was no appreciable amount of

land conveyed by the Indians. At the time of the passage of this act most all Indians were the owners of land that they had inherited from deceased relatives. The Indians, as a race, are rapidly disappearing; the death rate heretofore in this country has been much higher than that of the other races. The result of this condition has been to force a tremendous amount of lands upon the market and open the same to home-seekers from all parts of the American Union. Our population has increased rapidly. Eastern Oklahoma farmers, in respectable numbers, own, or think they own, their homes. Their deeds from full-blood Indian heirs have been approved by the County Courts as directed by the Act of Congress of May, 1908. Fully ninety-five per cent of the lands alienated in Eastern Oklahoma have been conveyed by the Indians since the Act of May, 1908.

In view of the remarkable development of this country, the great influx of home-seekers; in view of the fact that all our county judges who were vested with so much authority in approving conveyances under the Act of Congress, who have held the *Shulthis* v. *McDougal* rule to be a rule of property; in view of the fact that the Department of the Interior has also followed this rule in approving conveyances of every kind since May, 1909; in view of the fact that our own Supreme Court has repeatedly approved this holding, and has decided specifically and squarely, that taking into consideration the condi-

tions existing here, that a rule of property has been established by these decisions, we think that this court should not at this time decide that such rule of property has not been established. There is no question but that the people of Eastern Oklahoma in the expenditure of their money for homes, have relied upon this holding in their investments. To reverse this case would be disastrous to many.

As said before, this is a new and rapidly developing state. Real estate transactions by respectable home-seekers and investors have been of great proportions. We unhesitatingly say that since May, 1909, the time of the decision of the *Shulthis* v. *McDougal* case, *supra,* that more homes have been bought, more land sold and the conveyances approved by the county judges and Interior Department, in Eastern Oklahoma, than in any other older state, in the same amount of territory, in the last forty or fifty years. If time should be measured by the volume of land transactions, as compared to the older states of the Union, we think that there would be no question but that a rule of property has been established in this jurisdiction.

Encyclopedia of Law and Procedure, Vol. 11, page 755, is the following text:

> "Where judicial decisions may fairly be presumed to have entered into the business transactions of a country and have been acted upon as a rule of contracts and property, it is the duty of the court, on the principle of *stare decisis,* to adhere to such decisions without re-

gard to how it might be inclined to decide if the question were new. And this rule obtains, although the court may be of the belief that such decisions are founded upon an erroneous principle and are not sound, for when parties have acted upon such decisions as settled law and rights have been vested thereunder, their inherent correctness or incorrectness in the abstract are of less importance than that the rule of property so established should be constant and invariable. So such a rule controls as to decisions involving questions of constitutional law and the construction and operation of statutes."

We think the above is applicable to the conditions in this portion of our state. Our own court has squarely passed upon this question and has gone further and held as a fact that the *Shulthis-McDougal* case, *supra,* has become a rule of property in this jurisdiction.

We realize the fact that this great court has a right, and it is its duty, to decide as it pleases, but we respectfully submit that our own Supreme Judges who actually know the conditions that exist in this country, and who have before them all the authorities upon this subject, have a better right to know when a rule of property has been established in this jurisdiction than the members of this great court.

**Construction of Indian Treaties by State Courts.**

At one time the Indian Territory, now Eastern Oklahoma, was owned in its entirety by the Indians. Various treaties made by Congress and the various tribes provided for the leasing and alienation of this land. An implied invitation was extended by both Congress and the Indians to the white man of the older states to come and reside in Oklahoma. The invitation was accepted. Statehood was ushered in; state courts were established. It cannot be disputed that a large portion of our litigation in the state courts involves Indian lands, Congressional acts and Indian treaties. Our civilization could not stand if our state courts did not have authority to construe and determine the meaning of the Indian treaties and Acts of Congress relating to Indian matters. In a large measure Indian treaties, such as we have in this state, and Congressional acts relating to allotments and other matters, are but local laws, that is, they have but a local application, and it should go without question that when our courts of last resort place upon these acts and treaties a positive construction, that that construction, when it relates to vested rights, should not be disturbed.

Fortunately this situation has heretofore been before the Supreme Court of the United States and it has been determined that state courts, such as we have in Oklahoma, do have a right to pass upon, and settle, such questions as are involved in this action.

—*Best* v. *Polk,* 18 Wall. 112, 21 L. ed. 805;
*Francis* v. *Francis,* 203 U. S. 232, 51 L. ed. 165;
*Patterson* v. *Jenks,* 2 Pet. 216, 7 L. ed. 402;
*Rhode Island* v. *Mass.,* 12 Pet. 746, 9 L. ed. 1269;
*Lattimer* v. *Poteet,* 14 Pet. 18, 10 L. ed. 335.

## *Conclusion.*

We have always insisted that the reasoning in the cases of *Shulthis* v. *McDougal, Pigeon* v. *Buck* and *McDougal* v. *McKay et al.,* heretofore set out in full in this brief, is perfectly sound. We insist that the Circuit Court of Appeals was correct in its application of the Arkansas law to conditions in the Creek Nation. That court did not say positively that the estate involved in the action was in all respects an ancestral estate as described by the Arkansas decisions. The court could proceed by analogy alone, and from their reasoning and sound judgment they held, that while the estate was neither, strictly speaking, an ancestral estate, nor a new acquisition, yet the spirit of the law would be best subserved by classing it as an ancestral estate.

We believe that the reasoning of these cases is good and that a proper construction was placed upon the law, but even if this court should differ with these opinions, we still insist that they should not

be disturbed, for the reason that they have become a rule of property in this jurisdiction, and, right or wrong, should not be disturbed.

Respectfully submitted,

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